

No. 92-2058-CSX
Status: GRANTED

Title: Hawaiian Airlines, Inc., Petitioner
v.
Grant T. Norris
and
Paul J. Finazzo, et al., Petitioners
v.
Grant T. Norris

Docketed:
May 17, 1993

Court: Supreme Court of Hawaii

Counsel for petitioner: Hipp, Kenneth Byron, Moore Jr., Ralph J.

Counsel for respondent: Boyle, Edward DeLappe

Ptn due & mld 5-17-93, see ml label re dkt dt. 45
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25-93.

Entry	Date	Note	Proceedings and Orders
1	May 17 1993	G	Petition for writ of certiorari filed.
2	Jul 8 1993		Brief of respondent Grant T. Norris in opposition filed.
3	Jul 14 1993		DISTRIBUTED. September 27, 1993
4	Jul 23 1993	G	Motion of Air Transport Association of America for leave to file a brief as amicus curiae filed.
5	Sep 21 1993	X	Reply brief of petitioner filed.
6	Oct 4 1993		Motion of Air Transport Association of America for leave to file a brief as amicus curiae GRANTED.
7	Oct 4 1993	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Jan 5 1994		REDISTRIBUTED. January 21, 1994 (Page 1)
9	Jan 5 1994	X	Brief amicus curiae of United States filed.
10	Jan 21 1994		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 4, 1994. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 1, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 15, 1994. Rule 29 does not apply. *****
11	Feb 14 1994		Record filed.
		*	Partial proceedings Supreme Court of Hawaii (Box).
14	Feb 22 1994		Record filed.
		*	ORIGINAL PROCEEDINGS FIRST CIRCUIT COURT OF HAWAII (15 BOXES)
12	Mar 3 1994		Brief of petitioner Hawaiian Airlines, Inc. filed.
13	Mar 3 1994		Joint appendix filed.
15	Mar 4 1994		Brief amicus curiae of petitioner National Railway Labor Conference filed.
16	Mar 4 1994		Brief amicus curiae of Air Transport Association of America filed.
17	Mar 4 1994		Brief amicus curiae of New Jersey filed.
18	Mar 7 1994		SET FOR ARGUMENT WEDNESDAY, APRIL 27, 1994. (2ND CASE).

Entry	Date	Note	Proceedings and Orders
19	Mar 8 1994		CIRCULATED.
20	Mar 15 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Mar 21 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Apr 1 1994	X	Brief amicus curiae of United States filed.
23	Apr 1 1994	X	Brief amicus curiae of Railway Labor Executives' Association filed.
24	Apr 1 1994	X	Brief amici curiae of Hawaii, et al. filed.
25	Apr 1 1994		Brief amicus curiae of National Employment Lawyers Association filed.
26	Apr 1 1994	X	Brief amicus curiae of Allied Educational Foundation filed.
27	Apr 1 1994	X	Brief of respondent Grant T. Norris filed.
28	Apr 15 1994	X	Reply brief of petitioners Hawaiian Airlines, Inc., et al. filed.
29	Apr 15 1994		LODGING consisting of one set of 5 NRAB awards received from counsel for the Petitioner.
30	Apr 26 1994		LODGING consisting of 10 sets of various decisions of Railway Labor Act Adjustment received from counsel for the respondent.
31	Apr 28 1994		ARGUED.

92-2058^①

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

* * * *

HAWAIIAN AIRLINES, INC., PETITIONER

v.

GRANT T. NORRIS

and

PAUL J. FINAZZO, HOWARD E. OGDEN and
HATSUO HONMA, PETITIONERS

v.

GRANT T. NORRIS

* * * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF HAWAII

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Hawaii Supreme Court erred by applying the narrow test for preemption under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, articulated in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), to find that Norris' wrongful discharge tort claims were not preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, contrary to the plain language and intent of the RLA and the decisions of the United States Courts of Appeals for the Ninth, Fourth and Sixth Circuits holding that the *Lingle* analysis does not apply to RLA preemption.

LIST OF INTERESTED PARTIES

Petitioner Hawaiian Airlines, Inc., a Hawaii corporation, is a wholly-owned subsidiary of HAL, Inc., a publicly traded Hawaii corporation. HAL, Inc. is also the parent corporation of West Maui Airport, Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Supreme Court for the State of Hawaii in *Norris v. Finazzo, et al.*, Civil No. 89-2904-09, is reported at ____ Haw. ____, 842 P.2d 634 (Haw. 1992) (Appendix "App." A). The companion decision in *Norris v. Hawaiian Airlines, Inc.*, Civil No. 87-3894-12, is not reported (App. B). The orders of the Circuit Court of the First Circuit, State of Hawaii, which were the subject of the appeal are not reported.

JURISDICTION

The judgments of the Hawaii Supreme Court were entered February 16, 1993 (App. C). The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, clause 2 of the Constitution, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land

The pertinent sections of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, are reproduced at App. D. The pertinent provisions of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, are reproduced at App. E.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On February 2, 1987, Grant T. Norris ("Norris") became employed by Petitioner Hawaiian Airlines, Inc. ("Hawaiian Airlines") as an aircraft mechanic. *Finazzo*, 842 P.2d at 637. The terms and conditions of Norris' employment were governed by a collective bargaining agreement ("CBA") (App. F) negotiated between Hawaiian Airlines and the International Association of Machinists and Aerospace Workers (AFC-CIO) ("IAM" or "the Union") pursuant to the provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* (App. D).

On July 15, 1987, Norris was involved in a dispute with his supervisor concerning a tire change on an Hawaiian Airlines' jet aircraft. 842 P.2d at 637. Norris expressed concerns regarding the airworthiness of the "axle sleeve" portion of the tire assembly, but an Hawaiian Airlines' inspector found the axle sleeve to be airworthy and directed that the tire change be completed. *Id.*

Norris' supervisor asked Norris to sign a work record reflecting the tire change, pursuant to Article IV, ¶ D.4(a) of the CBA, which provides in relevant part: "An Aircraft Mechanic may be required to sign work records in connection with the work he performs." Norris refused to sign the record, citing his concern regarding the safety of the axle sleeve, and claiming that he himself had not performed the work in question.¹ (R. I:4) Norris'

¹Record cites to the record filed in the Hawaii Supreme Court in *Finazzo* and *Hawaiian Airlines* will be ("R." "Volume Number:" "page(s)").

supervisor told him that the supervisor and the inspector had signed a work record regarding the condition of the axle sleeve and that Norris' signature for the tire change was not an endorsement of the condition of the sleeve. Nevertheless, Norris would not change his position. After Norris refused to sign the work record, he was held out of service pending an investigation into his conduct in accordance with the CBA. CBA, Art. XV, ¶ F.1; (R. I:5).

Articles XV and XVI of the CBA set forth detailed procedures for the adjustment of grievances and other employment disputes and establish an arbitral panel, a System Board of Adjustment ("System Board"), for final and binding resolution of claims through arbitration. The CBA provides that the System Board "shall have exclusive jurisdiction over disputes between any employee covered by this Agreement and the Company and between the Company and the Union, growing out of grievances concerning disciplinary action, rules, rates of pay, or working conditions covered by [the CBA] . . . or out of the interpretation or application of any terms of [the CBA]" CBA, Art. XVI, ¶ C.

The CBA grievance process regarding Norris began on July 15, 1987, when a Step 1 grievance hearing was scheduled for July 31, 1987. 842 P.2d at 637. The grievance proceeding focused on whether Norris' failure to sign the work record provided just cause for disciplinary action against him in light of the CBA's requirement that mechanics sign off for work performed. (R. V:100-105, at ¶¶ 21-22; V:109-110) Norris took the position that his refusal to complete the requested work record was justified by his questions about the safety of the axle sleeve. Article XVII ¶ F of the CBA provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action."

Norris had an opportunity to present his argument at the Step 1 grievance hearing on July 31, 1987. Norris was present and represented at the hearing by his union representative. (R. V:100-105, at ¶¶ 21-22; V:109-110) On August 3, 1987, the hearing officer issued a Step 1 report finding Norris guilty of insubordination and recommending his termination. (Decision of Step 1 hearing officer, Aug. 3, 1987 (App. G))

At some time between July 15 and August 3, 1987, Norris

contacted the Federal Aviation Authority ("FAA") and reported that the axle sleeve he had observed was not airworthy. (R. XVII: Deposition of Grant Norris, Vol. 4, Feb. 10, 1990, at 709-10) On August 4, 1987, after the Step 1 determination had been made, the FAA contacted Hawaiian Airlines, inspected the axle sleeve and had it removed from the aircraft.

Pursuant to the CBA, Norris, through the IAM, filed an appeal to the Step 3 grievance level regarding the Step 1 determination. (R. I:8, at ¶ 36; V:134) Prior to the Step 3 hearing, Hawaiian Airlines reduced Norris' punishment from a termination to a suspension without pay for the period from August 3, 1987 to September 15, 1987, and ordered him reinstated effective that latter date. (Ltr. of Reinstatement, Sept. 10, 1987 (App. H))

Norris did not return to work on September 15, 1987, and he took no further steps to pursue his grievance through the System Board procedures mandated by the CBA. Instead, he abandoned the grievance process and several months later commenced litigation in state court. On March 2, 1988, three months after Norris filed suit, the FAA notified Hawaiian Airlines of a proposed civil penalty concerning the axle sleeve. In April 1990, the FAA settled all pending cases involving Hawaiian Airlines – including the axle sleeve matter – without making any findings of fact or conclusions of law.

B. NORRIS v. HAWAIIAN AIRLINES, INC., CIV. NO. 87-3894-12

Norris filed suit against Hawaiian Airlines in the First Circuit Court for the State of Hawaii on December 8, 1987, alleging termination in violation of public policy (Count I), violation of the Hawaii Whistleblowers' Protection Act, H.R.S. § 378-61 *et seq.* (Count II), intentional infliction of emotional distress (Count III), punitive damages (Count IV), and breach of the CBA (Count V). Count I specifically alleged that Norris was terminated in violation of public policies embodied within the Federal Aviation Act, 49 U.S.C. § 1301 *et seq.*, and the Federal Aviation Regulations (collectively "the Federal Aviation laws") due to his refusal to complete work records regarding the tire change.

Hawaiian Airlines removed the case to the United States District Court for the District of Hawaii on January 6, 1988, pursuant to the "complete preemption" doctrine. Thereafter, Hawaiian Airlines moved to dismiss the complaint in its entirety on the

grounds that Norris' claims were subject to the mandatory arbitration procedures of the RLA. The Federal District Court dismissed Count V of the complaint for breach of the CBA as "completely preempted," but remanded the remaining Counts, reasoning that the state court was competent to determine the issue of whether Hawaiian Airlines had a valid "preemption" defense based on the RLA.

In state court, Hawaiian Airlines filed a motion to dismiss for lack of subject matter jurisdiction due to RLA preemption. The circuit court dismissed Count I (termination in violation of public policy), finding that claim to be cognizable under the CBA arbitration procedure and therefore preempted by the RLA.

C. NORRIS v. FINAZZO, ET AL., CIVIL NO. 89-2904-09

On September 20, 1989, Norris filed a second suit against three Hawaiian Airlines' supervisory employees—Paul J. Finazzo, Howard E. Ogden and Hatsuo Honma ("the Individual Defendants"). Norris' claims against the Individual Defendants were for termination in violation of the public policies embodied in the Federal Aviation laws (Count I), termination in violation of the public policies embodied in the Hawaii Whistleblowers' Protection Act (Count II), intentional infliction of emotional distress (Count III), and punitive damages (Count IV). The suit against the Individual Defendants was consolidated with the *Hawaiian Airlines* suit.

The Individual Defendants moved to dismiss Counts I and II of the *Finazzo* complaint on grounds that those claims were preempted by the RLA. The state circuit court agreed and dismissed those counts. The circuit court certified the orders of partial dismissal in *Hawaiian Airlines* and *Finazzo*, as well as the order denying Norris' motions for reconsideration thereof, for immediate appeal pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure.²

²After Norris' appeal was fully briefed, the Hawaii Supreme Court dismissed the *Hawaiian Airlines* action *sua sponte* because the record on appeal did not contain a certified copy of the order of remand from the Federal District Court. The remand order was eventually reissued and certified, and the record of prior proceedings in the case, including the dismissal of Count I of the *Hawaiian Airlines* complaint, was ordered reinstated. The Rule 54(b) appeal of Count I then proceeded, and the parties once again briefed the preemption issues in the *Hawaiian Airlines* case.

D. DECISION OF THE HAWAII SUPREME COURT

In judgments entered February 16, 1993, the Hawaii Supreme Court reversed the dismissal of Count I of the *Hawaiian Airlines* complaint and Counts I and II of the *Finazzo* complaint. The court held, as a matter of federal law, that Norris' tort claims for wrongful discharge were not preempted under the RLA and should not have been dismissed. *Norris v. Finazzo*, __ Haw. __, 842 P.2d 634 (Haw. 1992).³

The Hawaii Supreme Court acknowledged that the determination of whether the RLA preempts state law claims is a question of congressional intent. 842 P.2d at 639. The court also recognized that the RLA was enacted to promote stability in railroad and airline industry labor-management relations by providing a comprehensive non-judicial framework for resolving employment disputes. *Id* at 640. The court nevertheless decided that congressional intent would not be frustrated by allowing Norris' claims for wrongful discharge to go forward in state court outside the RLA arbitration process. 842 P.2d at 648.

In rejecting the RLA preemption defense, the Hawaii Supreme Court applied a preemption test derived from Section 301 of the Labor Management Relations Act ("Section 301"), 29 U.S.C. § 185, as explicated in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), and *Maher v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750 (N.J. 1991). The *Lingle* case held that Section 301 preempts only those state law claims in which "the application [of state law] requires the interpretation of a collective bargaining agreement." 486 U.S. at 407. In *Maher*, the New Jersey Supreme Court extended the holding of *Lingle* to govern RLA preemption. 593 A.2d at 758. The Hawaii court concluded that, under the *Lingle* standard, Norris' claims were not preempted since resolving those claims, in the court's view, does not require any interpretation of the CBA. 842 P.2d at 645.

³The decision in *Finazzo* was issued December 16, 1992. In a subsequent memorandum opinion issued February 2, 1993 in the *Hawaiian Airlines* case, the Hawaii court adopted its reasoning and holding in *Finazzo* to find that Norris' claim for wrongful discharge against Hawaiian Airlines was not preempted. Since the *Hawaiian Airlines*' decision simply adopted the *Finazzo* reasoning and holding by reference, Petitioners will refer to the decision in *Norris v. Finazzo* in their discussion of the court's actions and in their arguments as to why certiorari should be granted.

Despite extensive briefing by both parties of the Ninth Circuit's decision in *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990) ("*Grote*"), which found RLA preemption on facts similar to those in *Norris*, the Hawaii Supreme Court did not cite or follow *Grote* or the Ninth Circuit's other decisions regarding RLA preemption. In *Grote*, the Ninth Circuit held that the test articulated by the Supreme Court in *Lingle* for preemption under Section 301 did not apply to RLA preemption since Congress intended for the RLA to have broader preemptive power. 905 F.2d at 1309-10. Unconstrained by *Lingle*, *Grote* held the RLA would preempt any state law claim "arguably governed" by a collective bargaining agreement "where the gravamen of the complaint is wrongful discharge." 905 F.2d at 1309. The Hawaii Supreme Court also failed to discuss other cases from the Fourth, Sixth and Ninth Circuits finding that the *Lingle* analysis does not apply to RLA preemption issues. *See Lorenz v. CSX Trans., Inc.*, 980 F.2d 263 (4th Cir. 1992); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 n.4 (6th Cir. 1989) (discussing *McCall v. Chesapeake & Ohio Ry.*, 844 F.2d 294 (6th Cir.), *cert. denied*, 488 U.S. 879 (1988)); *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1097 (9th Cir. 1991). *But see Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992) (*Lingle* analysis does apply to RLA preemption), *petition for certiorari filed*, 61 U.S.L.W. 3481 (1993).

Hawaiian Airlines and the Individual Defendants now respectfully petition this Court for a writ of certiorari to the Hawaii Supreme Court. As set forth more fully below, Petitioners believe review of the Hawaii court's decision presents an appropriate opportunity for exercise of this Court's certiorari jurisdiction since review would effectuate the clear mandate by Congress in the RLA that employment disputes such as those raised by Norris be resolved through arbitration; would resolve a split between the United States Court of Appeals for the Tenth Circuit and the Courts of Appeals for the Fourth, Sixth, and Ninth Circuits regarding the standard for determining RLA preemption; would resolve an intra-circuit split between the Hawaii Supreme Court and the Ninth Circuit regarding the RLA preemption standard; and would provide much needed guidance and uniformity regarding the preemption standard to be applied to employment disputes in the vital interstate railroad and airline industries governed by the RLA.

REASONS FOR GRANTING THE PETITION

I. NORRIS IS IN CONFLICT WITH THE EXPLICIT LANGUAGE OF THE RLA AND THE DECISIONS OF THREE UNITED STATES COURTS OF APPEALS BECAUSE IT WRONGLY APPLIES *LINGLE* TO DETERMINE THE SCOPE OF PREEMPTION UNDER THE RLA.

In *Norris*, the Hawaii Supreme Court was called upon to determine whether an employee can assert state tort “wrongful discharge” claims in state court when the dispute underlying those claims arises out of an application of the terms of the CBA and the grievance process itself and when the CBA explicitly grants to the System Board “exclusive jurisdiction over disputes between any employee covered by [the CBA] and the Company . . . growing out of grievances concerning disciplinary action, rules, rates of pay or working conditions covered by [the CBA] or out of the interpretation or application of any terms of [the CBA].” CBA Article XVI, ¶ C (emphasis supplied). The state circuit court had found Norris’ wrongful discharge claims preempted by the RLA. By applying the holding from *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), to revive Norris’ state law claims, the Hawaii Supreme Court ignored clear congressional intent, misapplied this Court’s precedent in the preemption area, and put itself in square conflict with the decisions of three federal courts of appeals. Those three courts have held, based on their analysis of the provisions of the RLA, its legislative history and this Court’s decisions, that the *Lingle* test is inapplicable to preemption under the RLA.

The *Lingle* test was developed by this Court to address preemption under Section 301. *Lingle*, 486 U.S. at 401. Section 301 provides that suits for breach of collective bargaining agreements may be brought in federal court. 29 U.S.C. § 185. Nothing in the text of Section 301 or its legislative history requires or even mentions arbitration as a mandatory forum for resolving workplace disputes. *Id.* In fact, this Court recently held that an employee was entitled to sue in federal court under Section 301 where his collective bargaining agreement was silent and did not specifically limit resolution of disputes to the grievance process. *Groves v. Ring Screw Works*, 498 U.S. 168 (1990).

Section 301 was first found to have preemptive power over

state court actions by this Court in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). Since the text of Section 301 does not evince a legislative intent to remove labor disputes from the courts or to commit them to an arbitral forum, it is clear that Section 301 preemption is a matter of “judicial imposition” rather than statutory creation. *Grote*, 905 F.2d at 1310.

In *Lingle*, this Court outlined the limited scope of Section 301 preemption:

Even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is “independent” of the agreement for § 301 pre-emption purposes.

486 U.S. at 410 (footnote omitted). The *Lingle* Court emphasized that its discussion pertained only to Section 301 preemption and that “it is important to remember that other federal labor law principles may pre-empt state law.” 486 U.S. 409 at n.8. The *Lingle* test was properly crafted to protect the interests identified by Congress in enacting Section 301—namely, to assure uniformity in the interpretation of collective bargaining agreements. Congress had broader purposes in enacting the RLA—namely, to require arbitration of a broad range of workplace disputes involving not only the interpretation of collective bargaining agreements, but also disputes arising out of the application of terms of those agreements.

Thus, unlike Section 301, which is silent on the issue of arbitration of workplace disputes, the RLA requires airlines with unionized employees to establish an arbitral forum—a System Board of Adjustment—for the resolution of “disputes between an employee . . . and a carrier . . . growing out of grievances or out of the interpretation or application of agreements concerning rate of pay, rules, or working conditions.” 45 U.S.C. § 184 (emphasis supplied). By use of the disjunctive, Congress plainly expected the System Board to resolve not only employment disputes requiring interpretation of agreements, but also disputes growing out of grievances concerning discipline or out of the application of agreements. Indeed, in Section 2 of the RLA, 45 U.S.C. § 151a, Congress went further and unequivocally stated that the purposes of the RLA included a statutory scheme to

provide for the prompt and orderly settlement of *all disputes concerning rates of pay, rules or working conditions* (emphasis supplied)

and, in addition,

to provide for the prompt and orderly settlement of all disputes growing out of grievances **or** out of the interpretation **or** application of agreements covering rates of pay, rules or working conditions. (emphasis supplied).

45 U.S.C. § 151a.

This Court has already held that the arbitral procedures mandated by the RLA cannot be avoided by an employee through characterization of a discharge as a state claim for breach of contract. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972). The *Andrews* Court found after review of the text of the RLA and its legislative history that the arbitral procedures mandated by Section 151a of the Act are compulsory. 406 U.S. at 322. The Court reasoned that, since Congress in the RLA clearly intended to direct transportation industry employment disputes into arbitration, the parties could not opt out of arbitration by mutual agreement, and an employee could not avoid arbitration simply by pleading a claim as one arising under state law. *Id.* The Court noted that Section 301 had in certain circumstances been held to require arbitration and that the RLA presented an even stronger case for compulsory arbitration "since the compulsory character of the [RLA] administrative remedy . . . stems not from any contractual undertaking between the parties but from the Act itself . . ." *Id.* at 323. *Cf. Groves v. Ring Screw Works*, 498 U.S. 168 (1990) (under Section 301 employee could bypass grievance process and file suit in federal court because the parties to the collective bargaining agreement had not contracted to arbitrate all disputes).

Given the mandatory arbitration provisions in the RLA and this Court's pronouncements on the scope of RLA preemption, three federal courts of appeals have held that the formula for Section 301 preemption set forth in *Lingle* is not the proper measure for preemption under the RLA. In accordance with the plain language of Section 2 of the RLA, those courts have held that RLA preemption is not limited to claims requiring an interpretation of CBA provisions, but extends beyond *Lingle* to pre-

empt "all disputes growing out of grievances or out of the interpretation or application" of collective bargaining agreements. 45 U.S.C. § 151a. The Hawaii Supreme Court in *Norris* failed to discuss or distinguish those three courts' decisions, and, as discussed in more detail below, the Hawaii court's decision is clearly in conflict with those courts, including the Ninth Circuit.

In *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990), the Ninth Circuit specifically rejected an employee's attempt to apply the *Lingle* test to a dispute regarding RLA preemption. The Ninth Circuit held that the scope of preemption under the RLA and Section 301 are not the same. 905 F.2d at 1309. The RLA contains a statutory provision requiring arbitration of employment disputes, and the LMRA does not. *Id.* The Ninth Circuit further found *Lingle* inapposite because the RLA, unlike Section 301, was enacted for the express purpose of keeping employment disputes in the railroad and airline industries "simple and out of reach of the often lengthy court process." *Id.*

Grote's facts are similar to those in *Norris*. In *Grote*, the employee had claimed that he was discharged in retaliation for his refusal to give false medical information to the FAA at his employer's request. 905 F.2d at 1309. The employer asserted his termination was warranted under the collective bargaining agreement because *Grote* had failed to maintain the requisite medical certification. *Id.* The Ninth Circuit held that Congress intended for the RLA arbitration procedure to preempt state law remedies in all cases where the gravamen of the employee's claim is wrongful discharge and the employer's actions are "arguably justified" by the terms of a collective bargaining agreement. *Id.* Accordingly, *Grote's* state law claims arising from the alleged wrongful discharge were dismissed. *Id.*

A separate panel of the Ninth Circuit Court of Appeals followed *Grote* to affirm that the *Lingle* standard does not apply to RLA preemption. *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1097 (9th Cir. 1991).

In *Lorenz v. GSX Transportation, Inc.*, 980 F.2d 263 (4th Cir. 1992), the United States Court of Appeals for the Fourth Circuit refused to apply *Lingle's* Section 301 analysis to narrow the scope of RLA preemption because "the [Supreme] Court has clearly recognized that preemption under the RLA is more pervasive." 980

F.2d at 268 (citing *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711 (1945)). The Fourth Circuit cited this Court's decision in *Andrews* as the "starting point for considering the preemptive effect of the RLA," 980 F.2d at 266, and found that *Andrews* and its progeny require preemption of all state tort claims "inextricably intertwined" with a collective bargaining agreement's grievance procedure. *Id.*

The Sixth Circuit Court of Appeals has also concluded that *Lingle* does not apply to RLA preemption analysis. In *McCall v. Chesapeake & Ohio Ry. Co.*, 844 F.2d 294 (6th Cir.), cert. denied, 488 U.S. 879 (1988), a case decided prior to *Lingle*, the Sixth Circuit held an employee's claim for violation of Michigan's disability discrimination law was preempted under the RLA due to the "strong similarity between the inquiry made by the arbitration board and the inquiry made by the jury in the state cause of action" 844 F.2d at 301. The *McCall* Court cited the broad federal policy articulated in the RLA to channel dispute resolution into non-judicial fora and held that, "[i]f the federal dispute resolution mechanism is to have any force, juries cannot be allowed to second-guess the decisions of arbitration boards." *Id.* at 302. On a motion for rehearing filed after *Lingle*, the Sixth Circuit issued a one-paragraph order stating that *Lingle* did not require reversal of its preemption finding. 844 F.2d at 304. In a subsequent decision, the Sixth Circuit cited *McCall* as a case in which *Lingle's* Section 301 preemption did not apply. *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 n.4 (6th Cir. 1989).

Norris is in clear conflict with the above decisions of the Ninth, Fourth and Sixth Circuit Courts of Appeals because it applies *Lingle's* Section 301 analysis to unduly confine the intended scope of RLA preemption. *Norris* also conflicts in principle with this Court's decision in *Andrews* since it permits *Norris* to bypass the RLA-mandated arbitral forum by recasting a claim cognizable under the CBA as a breach of state law. The Hawaii court has also wholly disregarded the plain language of the RLA and the CBA, both of which dictate resolution of all such employment disputes exclusively through the RLA's System Board procedures and specifically require arbitration of disputes growing out

of grievances *or* the application *or* interpretation of the CBA.⁴

Had the Hawaii Supreme Court followed the plain language of the RLA and the United States Courts of Appeals' decisions in *Grote*, *Lorenz* and *McCall*, it clearly would have found *Norris's* state law claims preempted because those claims arise from an application of the CBA and from the grievance process itself. Furthermore, *Norris's* state claims involve the same operative facts and issues as his claim for wrongful discharge under the CBA, and the CBA by its unambiguous terms commits all such disputes to the exclusive jurisdiction of the System Board. *Norris* himself recognized the identity of his state claims and his CBA claims when he drafted his complaint against Hawaiian Airlines to incorporate *all* of the allegations of his state claims (Counts I-IV) within his CBA breach claim (Count V).

Norris's state claims clearly arise out of the application of a number of provisions of the CBA and out of the grievance process itself. When the dispute arose between *Norris* and his supervisor about his refusal to sign the work record for the tire change, the two disagreed about whether the signature on the work record meant that *Norris* was signing for the condition of the axle sleeve. Since the CBA provides that "[a]n Aircraft Mechanic may be required to sign work records in connection with the work he performs," *Norris's* discipline for refusing to sign the work record clearly grew out of an application of the CBA. CBA, Article IV ¶ D.4(a). Since the CBA explicitly commits all employment disputes "growing out of . . . the interpretation or application of any terms of [the CBA]" to the exclusive jurisdiction of the System Board, the CBA by its terms precluded *Norris's* resort to the state courts. *Cf. Gilmer*, 111 S.Ct. 1647 (1991) (arbitration agreement covered by Federal Arbitration Act by its terms required arbitration of fed-

⁴Hawaiian Airlines and its mechanic employees, through the IAM, unequivocally adopted the RLA's broad commitment to arbitration in the CBA. Given that fact, the Hawaii Supreme Court's decision also conflicts in principle with this Court's recent decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991), holding an employee may not avoid a contractual agreement covered by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, to submit disputes to arbitration by filing suit under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* The Court noted the liberal federal policy favoring arbitration agreements and held the claimant had not overcome that strong preference by showing Congress intended to provide a mandatory judicial forum under the ADEA.

eral statutory age discrimination claim and precluded resort to courts).

The determination of the propriety of Hawaiian Airlines' actions will also turn on whether the airline is precluded by the CBA from disciplining Norris for refusing to sign the work record based on a concern for public safety. Article XVII ¶ F of the CBA provides: "An employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action." The CBA also requires just cause for the termination or suspension of an employee. CBA, Article IX ¶ 1.5; Article XV, ¶ H.

The Hawaii court conducted its own analysis of Article XVII ¶ F and found that that provision did not protect a mechanic who refused to sign off on work records or who refused to perform work out of safety concerns regarding the airworthiness of an aircraft. 842 P.2d at 634. A System Board with knowledge of the industry practices and working conditions would almost undoubtedly disagree with the court's narrow construction, thereby affording additional substantive protections to covered employees and, by extension, to the flying public. Indeed, an arbitration expert witness testified without contradiction in the record before the Hawaii Supreme Court that the CBA did protect employees who refused to sign work records out of safety concerns and that the CBA was remarkably broad and unusual in its protection of employees who refuse to work out of concern for public safety. (R. XXVII: Deposition of Ted Tsukiyama, Vol. II, Aug. 2, 1990 at 158)

Finally, an essential element of Norris' claims is a "discharge," and proving that will require interpretation *and* application of the CBA *and* of the grievance process itself. In Norris' case, the hearing officer at the Step 1 level recommended Norris' termination, but while the grievance was pending at the Step 3 level, the Step 3 hearing officer reduced the discipline to a suspension. Norris never returned to work or attempted to have his suspension overturned. Instead, several months after his reinstatement, he filed suit in state court claiming he had been discharged.

The nature and classification of the disciplinary action taken against Norris is a matter within the expertise of the System

Board, and it is a matter requiring uniformity of treatment throughout the airline and railroad industries. Certainly that is why Congress committed resolution of such disputes to the RLA arbitral process. *Cf. Mayon v. Southern Pacific Transp. Co.*, 805 F.2d 1250, 1253 (5th Cir. 1986), *cert. denied*, 488 U.S. 925 (1988) (worker who won reinstatement through the RLA grievance proceeding cannot subsequently sue for "wrongful discharge" under state law). Despite this fundamental purpose of the RLA, the Hawaii Supreme Court completely ignored Hawaiian Airlines' argument that the RLA precluded a state court from deciding the nature of Norris' discipline since that determination is part and parcel of the grievance process. If allowed to stand, the court's decision will require a state court jury to interpret the CBA and its application and the CBA's grievance procedure to determine if Norris was discharged; for Norris cannot prevail in his wrongful discharge claims if he was merely suspended.

II. THE HAWAII SUPREME COURT'S ERRONEOUS RULING ON RLA PREEMPTION RAISES ISSUES WORTHY OF CONSIDERATION BY THIS COURT SINCE IT IS ONE OF A NUMBER OF ERRONEOUS RULINGS ON THE SCOPE OF RLA PREEMPTION.

Norris is not the only recent decision applying *Lingle* to narrow the scope of RLA preemption and threaten the speedy and uniform dispute resolution procedure envisioned by Congress. *Cf. Atchison, Topeka & Santa Fe Railway v. Buell*, 480 U.S. 557, 562 (1987) (RLA enacted to promote stability in labor-management relations by promoting a comprehensive framework for resolving disputes).

Maher v. New Jersey Transit Rail Operations, Inc., 125 N.J. 455, 593 A.2d 750 (N.J. 1991), is another state court decision which refused to acknowledge the differences between Section 301 and RLA preemption and applied *Lingle* to determine preemption under the RLA. The New Jersey Supreme Court flatly rejected the premise that the RLA was intended by Congress to have greater preemptive force than the LMRA:

When a collective-bargaining agreement subject to the [LMRA] establishes a grievance and arbitration remedy, that remedy preempts state-law-based claims by force of section 301. That preemptive effect is no different

from that granted to the arbitral remedies established by the [RLA].

Id. at 759 (citations omitted). The *Norris* court relied on the quoted passage from *Maier* to find that *Lingle* applied in the RLA context. 842 P.2d at 643. Neither *Norris* nor *Maier* cite or distinguish the numerous federal cases finding *Lingle* inapplicable to RLA preemption.

In another recent case, the United States Court of Appeals for the Tenth Circuit relied on *Lingle* to hold that the RLA preempted only those claims requiring an interpretation of a collective bargaining agreement. *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), *petition for certiorari filed*, 61 U.S.L.W. 3481 (1993). The *Davies* court explicitly disagreed with the Ninth Circuit's reasoning in *Grote*. 971 F.2d at 467 n.5. American Airlines' petition for certiorari in the *Davies* case is currently pending before this Court.

Davies, *Maier*, and *Norris* ignore the legislative history and plain language of the RLA, as well as the decisions construing it, and instead apply a Section 301 preemption doctrine that unduly limits the congressionally-intended scope of RLA preemption.

With two opposing bodies of RLA preemption case law, transportation industry employees will be encouraged to forum shop among state and federal courts to find the ones which remain open to their artfully pled state law claims. Given the interstate nature of operations of most airline and railroad industry employers, the opportunity for such forum shopping is substantial. The need for uniform employment dispute resolution procedures lies at the heart of the RLA. Petitioners respectfully submit that this Court should review and correct the Hawaii court's analysis in *Norris* to clarify RLA preemption and require employment disputes such as *Norris*' wrongful discharge claims to be resolved as Congress intended—through arbitration.

CONCLUSION

For the reasons set forth herein, Hawaiian Airlines and the Individual Defendants respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAII

* * *

GRANT T. NORRIS, Plaintiff-Appellant,
vs. HAWAIIAN AIRLINES, INC., Defendant-Appellee
(CIV. NO. 87-3894-12)

and

GRANT T. NORRIS, Plaintiff-Appellant,
vs. PAUL J. FINAZZO, HOWARD E. OGDEN,
HATSUO HONMA, and JOHN DOES 1-50,
Defendants-Appellees
(CIV. NO. 89-2904-09)

NO. 15022

APPEALS FROM THE FIRST CIRCUIT COURT

DECEMBER 16, 1992

LUM, C.J., HAYASHI, */ WAKATSUKI **/ AND MOON, JJ.,
AND INTERMEDIATE COURT OF APPEALS
CHIEF JUDGE BURNS,
IN PLACE OF PADGETT, J., RECUSED

APPEAL AND ERROR — nature and grounds of appellate
jurisdiction — determination of questions of jurisdiction in gener-
al. A trial court's dismissal for lack of subject matter jurisdiction
is a question of law, reviewable de novo.

*/ Associate Justice Hayashi, who heard oral argument, retired from the
court on March 29, 1992. See HRS 602-10 (1985).

**/ Associate Justice Wakatsuki, who heard oral argument, passed away on
September 22, 1992. See HRS 602-10 (1985).

SAME— same — same.

Review of a motion to dismiss for lack of subject matter jurisdiction is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. Dismissal is improper unless it appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief.

SAME— same — same.

When considering a motion to dismiss pursuant to Hawaii Rules of Civil Procedure (HRCPP) Rule 12(b) (1), the trial court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.

SAME— same — same.

Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law.

SAME— same — same.

Whether a state law establishing a cause of action is preempted in a given case is a question of congressional intent.

LABOR RELATIONS — labor relations acts — in general.

The Railway Labor Act (RLA), 45 U.S.C. §§151-188 (1988), was enacted, to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes in the railroad industry and was extended to the airline industry pursuant to 45 U.S.C. 184 (1988).

SAME— same — same.

The purposes of the RLA are to provide for, among other things, the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions and the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

SAME— same — same.

Under the RLA, a "major" dispute relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

SAME— mediation, conciliation, and arbitration — application to railroads and other carriers.

Parties involved in major disputes are required to undergo a lengthy process of bargaining and mediation until they have exhausted those procedures. Once this protracted process ends and no agreement has been reached, the parties may resort to the use of economic force.

SAME— labor relations acts — in general.

Under the RLA, a "minor" dispute contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. The claim is to rights accrued, not merely to have new ones created for the future.

SAME— mediation, conciliation, and arbitration — application to railroads and other carriers.

Mandatory arbitration is the exclusive remedy for claims arising from minor disputes.

SAME— labor relations acts — validity — effect of federal legislation.

Where airline employee's claim for retaliatory discharge is not dependent on the interpretation of employee's collective bargaining agreement, employee's claims are not preempted under the RLA.

MASTER AND SERVANT — the relation — termination and discharge — actions for wrongful discharge.

Under the holding of *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982), the state tort claim for discharge in violation of public policy is not limited to at-will employees and extends to unionized employees who are not protected by a mandatory grievance/arbitration procedure and just cause standard for termination under their collective bargaining agreement.

ARBITRATION — nature and form of proceeding — nature and right to arbitration in general — arbitration favored public policy.

Although we agree that Hawaii's public policy as reflected by our Arbitration and Award Statute, Hawaii Revised Statutes (HRS) Chapter 658, strongly favors arbitration over litigation, the mere existence of an arbitration agreement does not mean that the parties must submit to an arbitrator disputes which are outside the scope of the arbitration agreement.

LABOR RELATIONS — mediation, conciliation, and arbitration — application to railroads and other carriers.

The arbitral forum must be authorized and competent to resolve the dispute brought before it. Arbitration is a continuation of the collective-bargaining process and the role of the arbitrator is to interpret the labor contract and to apply the agreement to the facts of a dispute. On the other hand, the arbitrator ordinarily cannot consider public interest, and does not determine violations of law or public policy.

SAME — labor relations act — purpose of acts.

There is no question that the relevant public policy of the Federal Aviation Act and the Federal Aviation Regulations is to protect the public from shoddy repair and maintenance practices in the aviation industry which may endanger the flying public.

SAME — same — same.

Legislative history of the Hawaii Whistleblowers' Protection Act (HWP), HRS 378-61 through -69 (Supp. 1991), reveals that the legislature intended to safeguard the general public by giving certain protections to individual employees who "blow the whistle" for the public good.

SAME — same — same.

The legislature did not restrict the protections under the HWP to at-will employees. On the contrary, it left open for the courts to further determine the development of the common law in retaliatory discharge cases.

OPINION OF THE COURT BY MOON, J.

Plaintiff-appellant Grant T. Norris (Norris) appeals from the final judgment of the Circuit Court of the First Circuit, which was certified as final, pursuant to Hawaii Rules of Civil Procedure (HRC) Rule 54(b), and entered in favor of defendants-appellees Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma (collectively, defendants). Norris had filed suit against defendants alleging discharge from his employment in violation of public policy. The circuit court granted defendants' motion to dismiss counts I and II of Norris' complaint for lack of subject matter jurisdiction on the ground that Norris' claims were preempted by the Railway Labor Act (RLA), 45 U.S.C. § 151-188 (1988). We disagree with the circuit court's determination and hold that the RLA does not preempt Norris' state tort claims. Therefore, we reverse the order of the circuit court dismissing counts I and II of Norris' complaint and vacate the final judgment entered by the circuit court.

I. STANDARD OF REVIEW

Defendants moved to dismiss counts I and II of Norris' complaint based on lack of subject matter jurisdiction, pursuant to HRCF Rules 12(b)(1) and 12(h)(3).¹ A trial court's dismissal for lack of subject matter jurisdiction is a question of law, reviewable *de novo*. *McCarthy v. U.S.*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *see also Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). Moreover, we adopt the view of the Ninth Circuit Court of Appeals in *Love v. U.S.*, 871 F.2d 1488 (9th Cir. 1989):

Our review [of a motion to dismiss for lack of subject matter jurisdiction] is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Id. at 1491 (citations omitted). However, "when considering a motion to dismiss pursuant to Rule 12(b)(1) the [trial] court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy*, 850 F.2d at 560 (citations omitted); *see also* 5A C. Wright & A. Miller, *FEDERAL PRACTICE AND PROCEDURE* §1350, at 213 (1990). Therefore, based on the applicable standard of review, we set forth the facts below as alleged by Norris in his complaint and in the materials presented to the trial court outside the pleadings.²

¹HRCF Rule 12(b)(1) provides in pertinent part that "[e]very defense . . . shall be asserted in the responsive pleading . . . except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter(.)"

HRCF Rule 12(h)(3) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

²Our review of the record reveals that attached to defendants' Motion to Dismiss Counts I and II For Lack of Subject Matter Jurisdiction and the various memoranda filed by the parties in support of or in opposition to the motion were a number of exhibits which the trial court considered in ruling on the subject motion.

II. FACTS

Norris, an aircraft mechanic licensed by the Federal Aviation Administration (FAA), was employed by Hawaiian Airlines, Inc. (HAL) from February 2, 1987 to August 3, 1987. Norris' FAA license carried a rating that gave him the authority to approve and return an aircraft to service after he had made, supervised, or inspected certain repairs performed on the aircraft. *See* Certification: Airmen Other Than Flight Crewmembers, 14 C.F.R. §§65.85, 65.87 (1987). Norris, however, was not allowed to approve and return to service any aircraft or aircraft parts to which repairs had been made that did not conform to the applicable Federal Aviation Regulations (FAR). Any fraudulent entry by a mechanic in any record or report required by the FAR is cause for the FAA to suspend or revoke the mechanic's FAA license. *See* Maintenance, Preventive Maintenance, Rebuilding and Alteration, 14 C.F.R. §43.12 (1992).

On July 15, 1987,³ Norris was conducting a routine preflight inspection on one of HAL's DC-9 aircraft when he noticed that one of the main landing gear tires was worn. When the tire and bearing were removed, Norris and the other mechanics present observed that the axle sleeve, which normally has a mirror-smooth surface, was scarred and grooved, with gouges and burn marks clearly visible.⁴ Norris and the other mechanics believed that the part was unsafe and should be replaced. However, Norris' supervisor, Justin Culahara (Culahara), ordered the mechanics to sand the axle sleeve by hand and put a new bearing and tire over it. The repairs were performed in accordance with Culahara's orders, and the aircraft made its scheduled flight.

When Norris was about to leave at the end of his shift, Culahara ordered Norris to "sign off" the maintenance record for the installation of the tire, which under the applicable FAR operated as a certification by Norris that the repair had been performed satisfactorily and the aircraft was fit for return to service. Norris refused, explaining that the sleeve was unsafe. He indicated that

³According to Norris' complaint, he was assigned to inspect the aircraft in question on July "14," 1987, but "punched out on July 15, 1987."

⁴Such damage may cause the sleeve to rub against the wheel bearing and, in turn, may cause the bearing or entire landing gear to fail.

he would sign off if Culahara "could show [Norris] in the [McDonnell Douglas] manual where it said that the axle was in satisfactory condition." Culahara informed Norris that if he did not sign the maintenance record, he [Norris] would be fired. Norris refused to sign off and was immediately suspended pending a termination hearing. Norris left the premises, and when he returned home, he called the FAA to report that there was a problem with an HAL aircraft that he had serviced. The FAA official advised Norris that the FAA would look into the matter.

Following his suspension, Norris invoked the grievance procedure outlined in the collective bargaining agreement (CBA), which governed the terms and conditions of his employment. The agreement was entered into between Norris' union, the International Association of Machinists, and HAL, pursuant to the provisions of the REA. The CBA provides that an employee may be disciplined or discharged only for just cause. It also states that an employee's refusal to perform work in violation of health and safety law "shall not warrant disciplinary action."

Norris' termination hearing was held on July 31, 1987, which resulted in his termination for "insubordination" on August 3, 1987.⁵ After he was terminated, Norris contacted the FAA and gave the details of what happened on July 15, 1987. On August 4, 1987, the FAA seized the axle sleeve and began a comprehensive investigation into the length of time the sleeve had been on the aircraft and the number of times the sleeve had been signed off while damaged. In September 1987, the FAA broadened its investigation to include other DC-9 aircraft. Defendants state in their answering brief:

While it is true that the FAA initially charged HAL with violation of Federal Aviation Regulations regarding the condition of the axle sleeve on August 4, 1987, the FAA made no findings of fact in that charge, and the charge was ultimately dismissed by the FAA with no findings of fact or conclusions of law having been made.

⁵Culahara's supervisor, Norman Matsutaki, Assistant Director of Base Management, presided over the termination proceedings as hearings officer.

Following his termination, Norris filed a grievance seeking reinstatement and back pay. Norris' union representative referred the grievance for a "Step 3" hearing⁶ pursuant to the CBA. However, before the hearing was conducted, HAL's Vice President of Maintenance and Engineering, Howard E. Ogden (Ogden), offered to "mitigate" Norris' punishment to suspension without pay for the period August 3, 1987 to September 15, 1987. Ogden warned Norris by letter that "any further instance of failure to perform [his] duties in a responsible manner" could result in his being discharged. Norris did not respond to HAL regarding the reinstatement offer, but filed suit against HAL in circuit court on December 8, 1987.⁷

On September 20, 1989, Norris filed this action against defendants Paul Finazzo, who at the time of Norris' termination was president of HAL, Ogden, and Hatsuo Honma, HAL's Director of

⁶Under Article XV, paragraph B. 3 of the CBA, the Step 3 hearing process is an appeal "to the Department Head under whose jurisdiction the employee works."

⁷HAL removed the case to the United States District Court on January 6, 1988. The district court determined that Count V of Norris' complaint, which alleged a claim for breach of the CSA, was completely preempted by the RLA and dismissed it because Norris had failed to exhaust his remedies under the CBA. The district court found the remaining claims to be within its discretionary pendent jurisdiction, but chose not to hear the claims and remanded the case to state court. Norris' complaint against HAL, identified as Civil No. 87-3894, is not at issue on this appeal because the circuit court's order and judgment entered in that case were vacated by this court due to lack of jurisdiction following removal from federal court. We stated:

Upon review of the record it appears Civil No. 87-3894 [Norris v. HAL] was removed to federal court under 28 U.S.C. §1446. It further appears that there is no certified order of remand in the record as required by 28 U.S.C. §1447(c) for the state court to proceed with the case. Thus, the circuit court lacked jurisdiction and its orders and judgment in Civil No. 87-3894 must be vacated. *See, e.g., 14A Wright, Miller & Cooper, Federal Practice & Procedure* §3737 (West 1985).

IT IS HEREBY ORDERED the circuit court's judgment dismissing Count I of the Complaint in Civil No. 87-3894 is vacated and the appeal from the HRCF 54(b) certified orders and judgment in Civil No. 87-3894 is dismissed.

IT IS FURTHER ORDERED the appeal from the HRCF 54(b) certified order and judgment in Civil No. 89-2904 [Norris v. Finazzo] is properly before the court and shall proceed without additional briefing.

Base Management.⁸ Norris' complaint alleges that defendants "directed, confirmed or ratified" the acts of HAL's employees resulting in his discharge in violation of public policy as articulated in the Federal Aviation Act and the FAR (count I), and in the Hawaii Whistleblowers' Protection Act (HWPB), Hawaii Revised Statutes (HRS) §§378-61 through -69 (Supp. 1991) (count II).⁹ On October 22, 1990, the circuit court concluded that the RLA preempted Norris' state tort claims and therefore dismissed counts I and II for lack of subject matter jurisdiction. The circuit court certified the dismissals as final pursuant to HRCP 54(b), and this timely appeal followed.

III. DISCUSSION

We first address whether the RLA preempts Norris' claims for discharge in violation of public policy. Because we conclude it does not, we next address whether the state tort claim as alleged by Norris exists under Hawaii law.

A. Preemption Issue

"Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law." *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 368 (1986). Whether a state law establishing a cause of action is preempted in a given case is a question of congressional intent. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

The RLA was enacted to promote stability in labor management relations by providing a comprehensive framework for resolving labor disputes in the railroad industry, *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 562 (1987), and was extended to the airline industry pursuant to 45 U.S.C. §184

⁸*Norris v. Hawaiian Airlines, Inc.*, No. 35022 (Haw. July 24, 1993) (order of partial dismissal).

⁹Norris' complaint names individual representatives authorized to act on behalf of HAL, but does not name HAL. However, the complaint does not allege that the individual defendants were acting outside the scope of their authority. Thus, because a corporation can act only through its authorized representatives, for purposes of this opinion, references to "employer" (HAL) are synonymous with the named defendants.

¹⁰The remaining counts in Norris' complaint are not at issue on this appeal.

(1988). The purposes of the RLA are to provide for, among other things,

the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions [and] . . . the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. §151(a).

The United States Supreme Court in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989), was called upon to examine the "two classes of controversy Congress had distinguished in the RLA." *Id.* at 302. These two classes of controversy were "regarded traditionally as the major and the minor disputes of the railway labor world." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945). However, because the Court had not previously "articulated an explicit standard for differentiating between major and minor disputes[.]" *Consolidated Rail*, 491 U.S. at 302, the Court in *Consolidated Rail* was compelled to do so.

A "major" dispute

relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

Id. (citing *Burley*, 325 U.S. at 723). Parties involved in major disputes are required "to undergo a lengthy process of bargaining and mediation[.] [u]ntil they have exhausted those procedures[.] . . . Once this protracted process ends and no agreement has been reached, the parties may resort to the use of economic force." *Id.* at 302-03 (citations omitted).

A "minor" dispute, on the other hand,

contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which

no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.

Id. at 303 (citing *Burley*, 325 U.S. at 723). Mandatory arbitration is the exclusive remedy for claims arising from minor disputes. *See id.* at 303-04; *see also Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322-23 (1972).

The mandatory arbitration provision of the RLA provides:

The disputes between an employee or group of employees and a carrier or carriers *growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions*, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. §153 First (i) (emphasis added).

Although the RLA provides a compulsory and binding arbitral system comprised of a National Railroad Adjustment Board, *see* 45 U.S.C. §153 First, there is no national adjustment board in the airline industry; minor disputes are resolved by adjustment boards established by the airlines and the unions. *See Consolidated Rail*, 491 U.S. at 304 n.4. The decision of an adjustment board is final and binding. 45 U.S.C. §153 First (m).

The parties in this case agree that Norris' claims do not give rise to a "major" dispute. The question then is whether Norris' claims may be deemed "minor," thereby preempting his state tort action and requiring him to submit to mandatory arbitration pursuant to the RLA.

Defendants contend that Norris' claims "constitute a 'dispute between [a] carrier and [an] employee' within the meaning of 45

U.S.C. §152 First [and therefore conclude that] it shall be the duty of 'all carriers, *their officers, agents and employees . . .* to settle all disputes, whether arising out of the application of [collective bargaining] agreements, or otherwise[.]'" (Emphasis in original.) This court in *Puchert v. Apsalud*, 67 Haw. 25, 677 P.2d 449 (1984), *appeal dismissed for want of substantial federal question*, 472 U.S. 1001 (1985), examined the scope of the preemption as it applied to airline employee Puchert's complaint of discharge from employment in violation of HRS §378-32(2) of the HWPB for filing a workers' compensation claim. We noted that

[c]ases holding that state law claims are pre-empted by the RLA are clearly distinguishable.¹⁰ The complaints filed in those cases constituted state law claims that were non-existent but for the collective bargaining agreement which provided remedies for such claims, or the state law claims were identical to the contractual claims provided for in the collective bargaining agreement.

Id. at 29, 677 P.2d at 454 (citations omitted) (footnote added). We held that Puchert's complaint was not a "minor dispute" subject to mandatory arbitration under the RLA because

¹⁰The following cases cited in *Puchert* are relied upon by defendants in this case:

Andrews v. Louisville and Nashville R.R. Co., [406 U.S. 320 (1972)] (state law claim of unlawful discharge depended solely on contract right not to be discharged); *Schroeder v. Trans World Airlines, Inc.*, [702 F.2d 189 (9th Cir. 1983)] (complaint of unlawful business practices in violation of California statutes was actually a complaint of wrongful demotion under the collective bargaining contract); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983) (complaints alleging intentional infliction of emotional distress referred to rights covered or substantially related to the collective bargaining agreement); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) (emotional distress incident to discharge from employment rather than result of alleged conspiracy); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (state claim raised identical to claim employee would have made had he pursued his grievance through channels specified in the collective bargaining agreement).

Puchert, 67 Haw. at 29-30, 677 P.2d at 454.

[t]he resolution of the dispute . . . does not hinge on the application or interpretation of the collective bargaining agreement between Pan Am and Puchert's union. Puchert complains of a violation of his right not to be discharged from his employment solely because he suffered from a work injury compensable under the state's worker's compensation law. This right finds its source not in the collective bargaining agreement between Pan Am and Puchert's union, but in the statute.

Id. at 30, 677 P.2d at 454 (emphasis added) (citation omitted).

Although a "minor" dispute contemplates the existence of a CBA, the term "grievances" as used in the mandatory arbitration provision of the RLA, could arguably be ambiguous and may be literally read to include disputes arising outside a CBA. However, the United States Supreme Court clearly determined otherwise in *Consolidated Rail*. The Court stated that "minor" disputes, to which §153 First (i) applies, are those that "may be conclusively resolved by interpreting the existing [collective bargaining] agreement." 491 U.S. at 305 (citation omitted). The Court also stated that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 307. The Supreme Court's interpretation of the RLA's mandatory arbitration provision demonstrates its belief that Congress intended to affect only those disputes involving contractually defined rights. Moreover, the plain language of §153 First (i) does not support preemption of disputes independent of a labor agreement.

In determining the RLA's scope of preemption, Norris asserts that the United States Supreme Court cases reviewing preemption under the Labor Management Relations Act (LMRA), 29 U.S.C. §§141-188, are analogous. Defendants, on the other hand, contend that such cases are inapposite to this case because preemption under the RLA is broader than under §301 of the LMRA. We note that although all parallels between the RLA and the LMRA must be drawn "with utmost care," *Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971), the Supreme Court has relied upon the "common law" of labor relations developed under the LMRA for assistance in construing the RLA. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*,

394 U.S. 369, 383-84 (1969).¹¹ See also *Puchert*, 67 Haw. at 32, 677 P.2d at 455 ("courts have [also] applied standards adopted in NLRA pre-emption cases to [Railway Labor Act] cases").

The United States Supreme Court has stated:

Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by §301 or other provisions of the federal labor law Such rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standard they disfavored. Clearly, §301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Allis-Chalmers Corp., 471 U.S. at 211-12 (emphasis added).

In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), plaintiff was injured on the job and filed a workers' compensation claim. Upon learning of the claim, the employer fired plaintiff for filing an allegedly false claim. Plaintiff filed a grievance, alleging that she had been discharged without just cause in violation of the CBA. While arbitration was proceeding, plaintiff filed a retaliatory discharge action in Illinois state court contending that she had been discharged for exercising her rights under Illinois' workers' compensation laws. The employer contended that the state law tort action was preempted by provisions of the CBA. The federal trial and appeal courts agreed and dismissed

¹¹In *Brotherhood of R.R. Trainmen*, the Court stated: "The Court has in the past referred to the [National Relations Act (NLRA)] for assistance in construing the Railway Act[.]" For purposes of this discussion, the NLRA, 29 U.S.C. §§151-187 (1988), is essentially equivalent to the LMRA because "the Labor-Management Relations Act, 1947, includes as its subchapter II the National Labor Relations Act of 1935 as amended by the Labor-Management Relations Act of 1947." 48 Am. Jur. 2d, *Labor and Labor Relations* §546 (1979) (footnote omitted).

the action. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 618 F. Supp. 1448 (S. D. Ill. 1985); *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987). The Supreme Court reversed, holding that application of state law is preempted by §301 of the LMRA only if the application requires the interpretation of a CBA. Examining Illinois law and the CBA at issue, the Supreme Court reasoned that in order

to show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under [Illinois Workers' Compensation] Act or to interfere with his exercise of those rights. Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. *Neither of the elements requires a court to interpret any term of a collective-bargaining agreement.* To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement. *Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for [LMRA] §301 preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.*

Lingle, 486 U.S. at 407 (citations omitted) (emphasis added).

In *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 593 A.2d 750 (1991), the New Jersey Supreme Court determined that plaintiff's claim of retaliatory discharge, based on New Jersey's Whistleblower statute, was not preempted by the RLA. In its analysis, the New Jersey court rejected the employer's argument that §301 of the LMRA has "less preemptive force" than the RLA. *Id.* at 472, 593 A.2d at 759. The court explained:

When a collective-bargaining agreement subject to the [LMRA] establishes a grievance and arbitration remedy, that remedy preempts state-law-based claims by force

of section 301. That preemptive effect is different from that granted to the arbitral remedies established by the [RLA]. Preemption becomes a dominant consideration under both statutes when the arbitration process can be disrupted or when the uniformity of national law is threatened by a state claim that must be vindicated through outside interpretation of a collective-bargaining agreement.

Id. at 472-73, 593 A.2d at 759 (citations omitted). Persuaded by the analysis of the courts in *Lingle* and *Maher*, we agree with Norris that LMRA preemption cases are analogous, and thus, may provide guidance in determining the scope of preemption under the RLA.

In *Lingle*, the Supreme Court held that application of state law is preempted by the LMRA only if the application is dependent on the interpretation of a collective bargaining agreement. That holding is virtually indistinguishable from the Supreme Court's reading of §153 First (i) of the RLA in *Consolidated Rail* and is also consistent with this court's interpretation in *Puchert*. We conclude that Congress intended the mandatory arbitration provision of the RLA be confined to the same limits the Supreme Court applied to the LMRA in *Lingle*.

In *Maher*, defendant New Jersey Transit Rail Operations (NJT) argued, as do the defendants in this case, that *Consolidated Rail* provides that a disagreement over an employer's action is a minor dispute if the contested action is arguably justified by the terms of the parties' [CBA]. The New Jersey Supreme Court noted that this test, articulated in *Consolidated Rail*, was not controlling in *Maher* because the standard was adopted in order to determine whether a disagreement was for a *major dispute* or a *minor dispute*.

The New Jersey court noted:

The danger with indiscriminate use of the "arguably justified" standard in distinguishing between minor disputes and complaints that do not implicate the Railway Labor Act is that it enables a railway "simply [to] hide behind the arbitration provisions of a collective bargaining agreement to bypass [its] employees' statutory right[s]."

Mahe, 125 N.J. at 470, 593 A.2d at 758 (citation omitted).

However, the New Jersey Court explained that even when considering the "arguably justified" test, Maher's whistleblower-based claim was not preempted by the RLA. The court stated:

The key to this puzzle lies in the nature of the "disputed action." . . . The nub of the disputed action, then, is not that Maher was discharged, which "arguably" would be covered by the "just-cause" provision of the collective-bargaining agreement, but that he was discharged in retaliation for having reported violations of the law. The pertinent question is whether the collective-bargaining agreement addresses NJT's alleged conduct.

Although NJT's burden is "relatively light" in showing that the agreement brings Maher's claim within the exclusive jurisdiction of the Adjustment Boards, the employer has not met that minimal standard. NJT has not suggested (the suggestion would be "obviously insubstantial") that a retaliatory discharge is "sanctioned" or "justified" by a provision in the agreement. It can point to no part of the collective-bargaining agreement that demonstrates that the carrier and the union have agreed on standards relevant to Maher's situation. Maher's claim of retaliatory discharge does not in any way turn on an interpretation of the just-cause-discharge clause or any other clause in the agreement.

Id. at 470-71, 593 A.2d at 758 (citation omitted).

In this case, defendants argue that Article IV and XVII of the CBA require interpretation in order to determine Norris' claim of retaliatory discharge. Article IV, paragraph D. 4(a)., provides that an aircraft mechanic "may be required to sign work records in connection with the work he performs." Defendants point to Culahara's (Norris' supervisor) deposition which indicates that he told Norris that he was not asking that Norris sign-off for the condition of the axle sleeve, but to sign off for the tire change in which Norris participated. On these facts, defendants assert that

Norris' "wrongful discharge" will require interpretation of Article IV of the CBA because HAL could certainly legitimately discipline Norris for refusing to sign a

work record if the work record did not cover the axle sleeve and if Norris could have noted his objections to the condition of the axle sleeve on any work record tendered to him for signature. *See Consolidated Rail Corp. v. Railway Labor Execs Assn.*, 491 U.S. 299, 307 (1989) (If an RLA employer asserts a contractual right to take an action contested by employees, the controversy is subject to the RLA's grievance/arbitration procedures if the employer's action is "arguably justified" by the terms of the collective bargaining agreement) [.]

We disagree. As in *Mahe*, Norris' retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and defendants do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the agreement nor do they point to any part of the CBA which demonstrates that the carrier and union have agreed on standards relevant to Norris' situation. Although defendants' defense is that Norris was terminated for insubordination, and thus "just cause," for not signing off on the work order, the respective positions of the parties to be presented at trial are, as noted in *Lingle*, "purely factual questions [which] pertain[] to the conduct of the employee and the conduct and motivation of the employer. Neither of [the parties' positions] requires a court to interpret any term of a collective bargaining agreement."¹² *Lingle*, 486 U.S. at 407.

Defendants also argue that Article XVII of the CBA

which protects employees from discipline for refusing to perform work in violation of state or federal health and safety laws, would have to be interpreted to determine if HAL acted "wrongfully" by initiating disciplinary action against Norris for refusal to sign off the work record. "The issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases[.]" *United Paper Workers International Union v. Misco, Inc.*, 484 U.S. 29, 44 n.11 (1987).

¹²Defendants also claim that Norris was merely suspended rather than terminated, which is also a factual issue to be determined by the trier of fact and is not dependent on the interpretation of any provision of the CBA.

However, the issue raised by Norris is not one of safety in the "workplace" for the benefit of the employees, but is focused on the public policy of protecting the safety of the flying public. As Norris points out,

Article XVII never refers to the safety of the public, which Norris was trying to protect. Instead, it refers, for example, to physical examinations for employees, to clean and dry washroom floors, to lights, to employee lockers, to unsafe and unsanitary working conditions, to protective apparel for employees, to rain repellent garments and boots for employees, to ear muffs, and to safety goggles.

We conclude that Norris' claim for retaliatory discharge is not dependent on an interpretation of Articles IV or XVII of the CBA or any other provision of the CBA. Consequently, Norris' claims are not preempted under the RLA.

B. Norris' State Tort Claims

1.

Defendants also argue that, even if Norris' claims are not preempted under the RLA, counts I and II, which are based on violations of public policies, do not state a claim arising under Hawaii law. Initially, we note that defendants do not deny the existence of the public policies relied upon by Norris under the Federal Aviation Act, the FAR, and the HWP. However, defendants contend that, under the holding of *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982), the state tort claim for discharge in violation of public policy is limited to at-will employees and does not extend to unionized employees who are protected by a "mandatory grievance/arbitration procedure and just cause standard for termination" under the CBA. We disagree.

In *Parnar*, a non-union employee (*Parnar*) filed a complaint alleging retaliatory discharge against *Americana Hotels, Inc.*, the managing partner of the *Ala Moana Hotel* in Honolulu, *Flagship International, Inc.*, the operator of the hotel, and *Mark E. Liquori*, the hotel's controller who was *Parnar*'s immediate supervisor. *Parnar* asserted that public policy was violated when she was discharged for giving truthful information about her employer's possible federal antitrust violations. We held that an employer may be held liable in tort where his discharge of an employee violates

a clear mandate of public policy." *Parnar*, 65 Haw. at 380, 652 P.2d at 631. This court determined that the relevant and clear public policy arising from the federal antitrust laws is to protect the public interest in free and unrestrained competition. We stated that "a retaliatory discharge in apparent furtherance of antitrust violations contravenes public policy." *Id.*

Defendants, however, maintain that Hawaii's public policy which "strongly favors upholding arbitration agreements" overrides the extension of *Parnar* to this case. Although we agree that Hawaii's public policy as reflected by our Arbitration and Award Statute, HRS chapter 568, strongly favors arbitration over litigation, the mere existence of an arbitration agreement does not mean that the parties must submit to an arbitrator disputes which are outside the scope of the arbitration agreement. See *Koolau Radiology, Inc. v. Queen's Medical Center*, 73 Haw. 433, 833 P.2d 890 (1992) (the arbitration agreement limited the scope of an arbitrator, a real estate appraiser, to determine lease values and did not extend the arbitrator's authority to decide legal issues such as the statute of frauds or the parol evidence rule as related to an alleged oral agreement).

The arbitral forum must be authorized and competent to resolve the dispute brought before it. "[A]rbitration is a continuation of the collective-bargaining process," and the role of the arbitrator is to interpret the labor contract and to apply the agreement to the facts of a dispute. On the other hand, the arbitrator "ordinarily cannot consider public interest, and does not determine violations of law or public policy."

Maier, 125 N.J. at 474, 593 A.2d at 760 (citations omitted).

In this case, there is no question that the relevant public policy of the Federal Aviation Act and the FAR is to protect the public from shoddy repair and maintenance practices in the aviation industry which may endanger the flying public. Moreover, we view the enactment of the HWP by our legislature following the *Parnar* decision as a clear mandate of public policy." *Parnar*, 65 Haw. at 380, 652 P.2d at 631. The HWP provides in pertinent part:

An employer shall not discharge, threaten or otherwise discriminate against an employee regarding the employ-

ee's compensation, terms, conditions, location, or privileges of employment because:

(1) The employee . . . reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false[.]

HRS § 378-62(1) (Supp. 1991).

Our review of the legislative history of the HWPB reveals that the legislature intended to safeguard the general public by giving certain protections to individual employees who "blow the whistle" for the public good. See Senate Stand. Comm. Rep. No. 1127, 1987 Senate Journal, at 1391-92 ("providing protection to government employees and citizens who are willing to 'blow the whistle' when they are aware of ethical or other violations of law will help the State maintain high standards of ethical conduct."); see also Hse. Stand. Comm. Rep. No. 25, 1987 House Journal, at 1090. The legislature did not restrict such protections to at-will employees. On the contrary, it left open for the courts to further determine the development of the common law in retaliatory discharge cases:

Our [s]upreme [c]ourt has recently developed a common law tort for discharging an employee contrary to public policy in *Parnar v. Ala Moana Americana Hotels, Inc.*, 65 Haw. 370 (1982). The scope of this newly created right, the remedies which are allowed, and the procedures which are applicable have not been jury determined. Your Committee does not believe that the legislature should stifle or restrict the developing common law. Therefore, *a new section was added to provide that the statutory rights of action created herein are not to be construed to limit the development of the common law or as a legislative preemption of the common law on practices sought to be prohibited by this Act.*

Id. (emphasis added).

Furthermore, we note that the legislature contemplated the potential conflict between union and non-union employees by

specifically providing that "[w]here a collective bargaining agreement provides inferior rights and remedies to those provided in [the HWPB], the provisions of [the HWPB] shall supersede and take precedence over the rights, remedies, and procedures provided in collective bargaining agreements." HRS §378-66(b) (Supp. 1991).

Amicus¹³ Hawaii Employers Council (HEC) urges that there is no need to extend *Parnar* to cover unionized employees. HEC argues that:

Simply because the remedies in each forum may be different does not mean that an employee has lesser protection under a collective bargaining agreement. Unionized employees have equitable remedies available under their collective bargaining agreements that are not available in actions at law. Reinstatement is a remedy that is commonly awarded by arbitrators under collective bargaining agreements. Moreover, punitive damages are available in arbitration if the parties have not excluded them.

As the Superior Court of Pennsylvania has held:

[W]e are not persuaded by appellant's arguments that the wrongfully discharged at-will employee has greater remedies available in a civil action than does a union employee under a collective bargaining agreement since a civil court could award punitive damages.* While the at-will employee may be entitled to punitive damages in a civil action, he does not have the ability to obtain some of the remedies available to union members; such as reinstatement to his position, which is a commonly provided remedy in labor agreements. Thus, we find that a difference in remedies is not enough to justify an extension of the coverage of a wrongful discharge action.

¹³Amicus curiae briefs were filed by HEC, Aloha Airlines, Inc., and International Association of Machinists' and Aerospace Workers, AFL-CIO and District Lodge 141 of the International Association of Machinists' and Aerospace Workers, AFL-CIO.

*Although punitive damages are not generally available under collective bargaining agreements, if the agreement is silent as to remedies, arbitrators can award punitive damages.

(Emphasis added.)

HEC's argument is without merit because the CBA in this case is *not* silent as to remedies. Article XV of the CBA, entitled "Grievance Procedure," paragraph H, provides:

If as a result of any hearing or appeals therefrom it is found the suspension or discharge was not justified, the employee shall be reinstated without loss of seniority and made whole for any loss of pay he suffered by reason of his suspension or discharge, and his personnel records shall be corrected or cleared of such charge. If a suspension rather than discharge results, the employee shall have that time he has been held out of service without pay credited against his period of suspension. In determining the amount of back wages due an employee who is reinstated as a result of the procedures outlined in this Agreement, the *maximum liability of the Company shall be limited to the amount of normal wages he would have earned in the service of the Company had he not been discharged or suspended.*

(Emphasis added.)

The difference between the remedies available under the CBA and the measure of damages under a state tort action are substantial. Where the CBA limits the employer's liability to reinstatement and back wages, the measure of damages under state tort actions includes a sum of money which will restore [claimant] to the position he [or she] would be [in] if the wrong had not been committed." *Nobriga v. Raybestos-Manhattan, Inc.*, 67 Haw. 157, 162, 683 P.2d 389, 393 (citing *Rodrigues v. State*, 52 Haw. 156, 167, 472 P.2d 509, 517 (1970)), *recon. denied*, 67 Haw. 683, 744 P.2d 779 (1984). Where the evidence justifies tort recovery, it may generally include special damages, which compensate claimants for specific out of pocket financial expenses and losses, general damages for pain, suffering, and emotional distress, *In Re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (1990), and punitive damages assessed for the purpose of punishing the defen-

dant for aggravated or outrageous misconduct and to deter defendant and others from similar conduct in the future. *See Masaki v. General Motors*, 73 Haw. 3, 780 P.2d 566, *recon. denied*, 71 Haw. 664, 833 P.2d 899 (1989).

Therefore, we conclude that the wide disparity between the remedies available under the CBA and the damages potentially recoverable in a state tort action, coupled with the legislature's enactment of the HWPB following *Parnar* justifies the extension of *Parnar* to this case. We believe such extension promotes the public policies underlying the Federal Aviation Act, the FAR, and the HWPB.

2.

Because we have determined that Norris' state tort claims are not dependent on any interpretation of the CBA, we must now consider "whether application of state law in this case interferes with the scheme of the RLA." *Puchert v. Apsalud*, 67 Haw. at 31, 677 P.2d at 455. We are in accord with the New Jersey Supreme Court in determining that the RLA does not "express [any] congressional limitation of the right of States to protect an employee from discharge in retaliation for reporting violations of law, nor can such limitation be inferred from the federal act's scope." *Maher*, 125 N.J. at 471, 593 A.2d at 758. Moreover, we have held that Norris' claims are not subject to arbitration under the RLA, and thus, we find the defendants' argument that the intent of the RLA, which is to provide a specific arbitral forum for industrial disputes "concerning rates of pay, rules, or working conditions," would be undermined is without merit. Finally, there is nothing in the record to indicate that the intent of the RLA to promote stability of labor-management relations will in any way be disrupted by not preempting Norris' state tort claims. Thus, we conclude that the application of Norris' state-based-tort claims do not interfere with the scheme of the RLA.

IV. CONCLUSION

Based on the foregoing discussion, we reverse the order of the trial court dismissing counts I and II of Norris' complaint, vacate the final judgment, and remand this case for further proceedings.

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Opinion of the Court, No. 15022, NORRIS v. FINAZZO

APPENDIX B

NO. 16263

IN THE SUPREME COURT OF THE STATE OF HAWAII

<i>CIVIL NO. 87-3984-12</i>	)	CIV. NOS. 87-3894-12 and
GRANT T. NORRIS,	)	89-2904-09
)	
Plaintiff-Appellant,	)	APPEAL FROM THE FINAL
	)	JUDGMENT PURSUANT TO
vs	)	RULE 54(b) OF THE HAWAII
	)	RULES OF CIVIL PROCEDURE
HAWAIIAN AIRLINES, INC.,	)	WITH REGARD TO COUNT I
	)	OF THE COMPLAINT IN
Defendant-Appellee.	)	CIVIL NO. 87-3894-12
	)	(REINSTATED ON JUNE 30, 1992)
)	
<i>CIVIL NO. 89-2094-09</i>	)	FIRST CIRCUIT COURT
GRANT T. NORRIS,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	
)	
PAUL J. FINAZZO,)	
HOWARD E.)	
OGDEN, HATSUO HONMA,)	
and)	
DOES 1-10,)	
)	
Defendants-Appellees.)	

MEMORANDUM OPINION

Plaintiff-appellant Grant T. Norris (Norris) appeals from the "reinstated" final judgment of the Circuit Court of the First Circuit, which was certified as final, pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 54(b), and entered in favor of

defendant-appellee Hawaiian Airlines, Inc. (HAL) on June 30, 1992. The "reinstated" final judgment was originally entered on December 5, 1990 from which a prior appeal was taken. *See Norris v. Hawaiian Airlines, Inc.*, No. 15022 (Haw. Dec. 16, 1992). However, this court on July 24, 1991, issued an order dismissing the appeal from the December 5 judgment¹ because, having previously removed the case to federal court, "there [was] no certified order of remand in the record as required by 28 U.S.C. 1447(c) for the state court to proceed with the case." *Id.*, slip op. at 7 n.7. (quoting this court's order of partial dismissal, filed July 24, 1991, in case No. 15022). A certified copy of the remand order was thereafter properly placed in the court file. Norris then successfully moved to reinstate the orders and final judgment from which this timely appeal is taken.

Norris had filed suit against HAL alleging discharge from his employment in violation of public policy. The circuit court granted HAL's motion to dismiss for lack of subject matter jurisdiction, dismissing count I of Norris' complaint on the ground that Norris' claims were preempted by the Railway Labor Act (RLA), 45 U.S.C. 151-188 (1988). For the reasons stated in our recent opinion, *Norris v. Hawaiian Airlines, Inc.*, No. 15022 (Haw. Dec. 16, 1992), we disagree with the circuit court's determination and hold that the RLA does not preempt Norris' state tort claims.

We therefore vacate the "reinstated" final judgment entered by the circuit court on June 30, 1992 and remand this case for further proceedings.

DATED: Honolulu, Hawaii, February 2, 1993.

On the briefs:

Edward deLappe Boyle,
Susan Oki Mollway, and
Dennis W. Chong Kee,
of Cades, Schutte,
Fleming & Wright, for
plaintiff-appellant
Grant T. Norris

¹The court retained jurisdiction over Norris' action against the individual representatives authorized to act on behalf of (Civ. No. 89-2904-09), which Norris had named in a separate lawsuit that had been consolidated with the action against (Civ. No. 87-3894-12).

Kenneth B. Hipp and
Jennifer Cook Clark,
of Goodsill, Anderson,
Quinn & Stifel, for
defendant-appellee
Hawaiian Airlines, Inc.

APPENDIX C

NO. 16263

IN THE SUPREME COURT OF THE STATE OF HAWAII

CIVIL NO. 87-3984-12	) CIV. NOS. 87-3894-12 and
GRANT T. NORRIS,	) 89-2904-09
)
Plaintiff-Appellant,	) APPEAL FROM THE FINAL
	) JUDGMENT PURSUANT TO
vs.	) RULE 54(b) OF THE HAWAII
	) RULES OF CIVIL PROCEDURE
HAWAIIAN AIRLINES, INC.,	) WITH REGARD TO COUNT I
	) OF THE COMPLAINT IN
Defendant-Appellee.	) CIVIL NO. 87-3894-12
<hr/>	) (REINSTATED ON JUNE 30, 1992)
)
CIVIL NO. 89-2094-09	) FIRST CIRCUIT COURT
GRANT T. NORRIS,)
	) HONORABLE ROBERT G. KLEIN
Plaintiff-Appellant,	) HONORABLE PHILIP T. CHUN
	) HONORABLE SIMEON R. ACOBA, JR.
vs.	) HONORABLE PATRICK K.S.L. YIM
	) HONORABLE MARCIA WALDORF
PAUL J. FINAZZO,)
HOWARD E.	) HONORABLE SHUNICHI KIMURA
OGDEN, HATSUO)
HONMA, and	) HONORABLE BARRY KURREN
DOES 1-10,	) HONORABLE WENDELL K. HUDDY
) Judges
Defendants-Appellees.)
<hr/>)

JUDGMENT ON APPEAL**CERTIFICATE OF SERVICE**

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 GRANT T. NORRIS

NO. 16263

IN THE SUPREME COURT OF THE STATE OF HAWAII

CIVIL NO. 87-3984-12) CIV. NOS. 87-3894-12 and
GRANT T. NORRIS,	) 89-2904-09
)
Plaintiff-Appellant,	) APPEAL FROM THE FINAL
	) JUDGMENT PURSUANT TO
vs.	) RULE 54(b) OF THE HAWAII
	) RULES OF CIVIL PROCEDURE
HAWAIIAN AIRLINES, INC.,	) WITH REGARD TO COUNT I
	) OF THE COMPLAINT IN
Defendant-Appellee.	) CIVIL NO. 87-3894-12
	) (REINSTATED ON JUNE 30, 1992)
)
CIVIL NO. 89-2094-09	) FIRST CIRCUIT COURT
GRANT T. NORRIS,)
	) HONORABLE ROBERT G. KLEIN
Plaintiff-Appellant,	) HONORABLE PHILIP T. CHUN
	) HONORABLE SIMEON R. ACOBA, JR.
vs.	) HONORABLE PATRICK K.S.L. YIM
	) HONORABLE MARCIA WALDORF
)
PAUL J. FINAZZO,	) HONORABLE SHUNICHI KIMURA
HOWARD E.)
OGDEN, HATSUO)
HONMA, and	) HONORABLE BARRY KURREN
DOES 1-10,	) HONORABLE WENDELL K. HUDDY
	) Judges
Defendants-Appellees.)
)

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Hawaii Supreme Court entered on February 2, 1993, the reinstated final judgment of the Circuit Court of the First Circuit entered on June 30, 1992 is vacated and this case is remanded to the Circuit Court of the First Circuit for further proceedings consistent with this Court's Memorandum Opinion filed on February 2, 1993.

DATED: Honolulu, Hawaii; February 16, 1993

BY THE COURT

/s/ Sandra H. Yasui

CLERK

APPROVED:

/s/ RONALD T. Y. MOON

JUSTICE

NO. 16263

IN THE SUPREME COURT OF THE STATE OF HAWAII

CIVIL NO. 87-3984-12	) CIV. NOS. 87-3894-12 and
GRANT T. NORRIS,	) 89-2904-09
)
Plaintiff-Appellant,	) APPEAL FROM THE FINAL
	) JUDGMENT PURSUANT TO
vs.	) RULE 54(b) OF THE HAWAII
	) RULES OF CIVIL PROCEDURE
HAWAIIAN AIRLINES, INC.,	) WITH REGARD TO COUNT 1
	) OF THE COMPLAINT IN
Defendant-Appellee.	) CIVIL NO. 87-3894-12
_____	) (REINSTATED ON JUNE 30, 1992)
)
CIVIL NO. 89-2094-09	) FIRST CIRCUIT COURT
GRANT T. NORRIS,)
	) HONORABLE ROBERT G. KLEIN
Plaintiff-Appellant,	) HONORABLE PHILIP T. CHUN
	) HONORABLE SIMEON R. ACOBA, JR.
vs.	) HONORABLE PATRICK K.S.L. YIM
	) HONORABLE MARCIA WALDORF
PAUL J. FINAZZO,)
HOWARD E.	) HONORABLE SHUNICHI KIMURA
OGDEN, HATSUO)
HONMA, and	) HONORABLE BARRY KURREN
DOES 1-10,	) HONORABLE WENDELL K. HUDDY
	) Judges
Defendants-Appellees.)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing document was duly served upon the following on February 05, 1993, addressed as follows:

MARTIN ANDERSON
 DAVID J. DEZZANI
 KENNETH B. HIPPI
 STEVEN M. NAKASHIMA
 BARBARA A. PETRUS
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DATED: Honolulu, Hawaii; Feb. 05, 1993

 EDWARD deLAPPE BOYLE
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 Attorneys for Plaintiff-
 Appellant GRANT T. NORRIS

NO. 15022
IN THE SUPREME COURT OF THE STATE OF HAWAII

GRANT T. NORRIS,	) CIVIL NO. 89-2904-09
)
Plaintiff-	) APPEAL FROM THE:
Appellant,	) (1) FINAL JUDGMENT PURSUANT
TO)
	) RULE 54(b) WITH REGARD TO (A)
vs.	) COUNT I OF THE COMPLAINT IN
	) CIVIL NO. 87-3894-12, AND (B)
PAUL J. FINAZZO;)
HOWARD E. OGDEN;	) COUNTS I AND II OF THE
HATSUO HONMA;	) COMPLAINT IN CIVIL NO. 89-
and DOES 1-50,	) 2904-09 AND (2) ORDER DENYING
	) PLAINTIFF'S MOTION FOR
Defendants-	) RECONSIDERATION AS TO COUNT I
Appellees.	) OF (A) ORDER GRANTING IN PART
	) AND DENYING IN PART HAWAIIAN
	) AIRLINES, INC.'S MOTION TO
	) DISMISS FOR LACK OF SUBJECT
	) MATTER JURISDICTION FILED ON
	) NOVEMBER 1, 1989 AND (B) ORDER
	) GRANTING IN PART PLAINTIFF'S
	) MOTION TO STRIKE SECOND AND
	) THIRD AFFIRMATIVE DEFENSES OR
	) IN THE ALTERNATIVE FOR SUMMARY
	) JUDGMENT AS TO DEFENSE OF
	) PREEMPTION FILED ON OCTOBER
	) 27, 1989 (MOTION FILED ON
) NOVEMBER 6, 1989)
)
) FIRST CIRCUIT COURT
) HONORABLE ROBERT G. KLEIN
) Judge
)

JUDGMENT ON APPEAL
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Attorneys for Plaintiff-Appellant
GRANT T. NORRIS

NO. 15022

IN THE SUPREME COURT OF THE STATE OF HAWAII

GRANT T. NORRIS,) CIVIL NO. 89-2904-09
)
 Plaintiff-) APPEAL FROM THE:
 Appellant,) (1) FINAL JUDGMENT PURSUANT
 TO)
) RULE 54(b) WITH REGARD TO (A)
 vs.) COUNT I OF THE COMPLAINT IN
) CIVIL NO. 87-3894-12, AND (B)
)
 PAUL J. FINAZZO;)
 HOWARD E. OGDEN;) COUNTS I AND II OF THE
 HATSUO HONMA;) COMPLAINT IN CIVIL NO. 89-
 and DOES 1-50,) 2904-09 AND (2) ORDER DENYING
) PLAINTIFF'S MOTION FOR
 Defendants-) RECONSIDERATION AS TO COUNT I
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) MOTION TO STRIKE SECOND AND
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) IN THE ALTERNATIVE FOR SUMMARY
) JUDGMENT AS TO DEFENSE OF
) PREEMPTION FILED ON OCTOBER
) 27, 1989 (MOTION FILED ON
) NOVEMBER 6, 1989)
)
) FIRST CIRCUIT COURT
) HONORABLE ROBERT G. KLEIN
) Judge
)
 _____)

JUDGMENT ON APPEAL

Pursuant to the opinion of the Hawaii Supreme Court entered on December 16, 1992, the judgment of the Circuit Court of the First Circuit entered on December 5, 1990 is reversed and vacated insofar as it dismissed Counts I and II in Civil No. 89-2904-09, and this case is remanded to the Circuit Court of the First Circuit for further proceedings consistent with this Court's Opinion filed on December 16, 1992.

DATED: Honolulu, Hawaii; February 16, 1993

BY THE COURT

/s/ Sandra H. Yasui

CLERK

APPROVED:

/s/ RONALD T. Y. MOON

JUSTICE

NO. 15022

IN THE SUPREME COURT OF THE STATE OF HAWAII

GRANT T. NORRIS,) CIVIL NO. 89-2904-09
)
 Plaintiff-) APPEAL FROM THE:
 Appellant,) (1) FINAL JUDGMENT PURSUANT
 TO)
) RULE 54(b) WITH REGARD TO (A)
 vs.) COUNT I OF THE COMPLAINT IN
) CIVIL NO. 87-3894-12, AND (B)
)
 PAUL J. FINAZZO;)
 HOWARD E. OGDEN;) COUNTS I AND II OF THE
 HATSUO HONMA;) COMPLAINT IN CIVIL NO. 89-
 and DOES 1-50,) 2904-09 AND (2) ORDER DENYING
) PLAINTIFF'S MOTION FOR
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) AIRLINES, INC.'S MOTION TO
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) NOVEMBER 6, 1989)
)
) FIRST CIRCUIT COURT
) HONORABLE ROBERT G. KLEIN
) Judge
)
 _____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing document was duly served upon the following on this date by hand delivery, addressed as follows:

MARTIN ANDERSON
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 Honolulu, Hawaii 96813

Attorneys for Defendant-Appellees

DATED: Honolulu, Hawaii; Feb. 05, 1993

/s/ Susan Oki Mollway

EDWARD deLAPPE BOYLE
 SUSAN OKI MOLLWAY

Attorneys for Plaintiff-
 Appellant GRANT T. NORRIS

APPENDIX D**RAILWAY LABOR ACT****Section 2, 45 U.S.C. §151a****§151a. General purposes**

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * * *

Section 204, 45 U.S.C §184**§184. System, group, or regional boards of adjustment**

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully

exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carrier either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provision of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

APPENDIX E

Section 301 of the Labor-Management Relations Act,

29 U.S.C. §185

§185. Suits by and against labor organizations**(a) Venue, amount, and citizenship**

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor

organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX F

AGREEMENT

Between

HAWAIIAN AIRLINES, INC.

and

INTERNATIONAL
ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
(AFL-CIO)

Representing
AIRCRAFT INSPECTORS, MECHANICS,
LINE SERVICEMEN AND CLEANERS

January 16, 1987 - January 15, 1989

ARTICLE I

PURPOSE OF AGREEMENT

A. The purpose of this Agreement is, in the mutual interest of the Company and of the employees, to provide for the operation of the services of the Company under methods which will further to the fullest extent possible the safety of air transportation, the efficiency of operation, and the continuation of employment under conditions of reasonable hours, proper compensation, and reasonable working conditions. It is recognized by this Agreement to be the duty of the Company and of the employees to cooperate fully, both individually and collectively, for the advancement of that purpose.

B. No employee covered by this Agreement will be interfered with, restrained, coerced, or discriminated against by the Company, its officers, or agents because of membership in or lawful activity on behalf of the Union.

C. It is understood that wherever in this Agreement employees or classifications are referred to in the male gender, it shall be recognized as referring to both male and female employees, and that the terms and conditions hereunder apply equally to all employees regardless of sex, color, race, creed, or national origin.

* * * *

ARTICLE IV

CLASSIFICATIONS OF WORK & QUALIFICATIONS

A. For the purpose of this Agreement, the recognized classifications of work shall be as hereunder listed:

Lead Inspector
Inspector
Lead Aircraft Mechanic
Lead Mechanic
Aircraft Mechanic
Mechanic
Mechanic Helper
Lead Line Serviceman
Line Serviceman
Lead Cleaner
Cleaner

B. It is understood that it is not necessary to have each of the above classifications in each shop.

C. It is further understood that any employee covered by this Agreement may be required to do the work of a lower classification; provided, however, that when performing such work, he will be paid at the rate in which he is regularly classified. Any employee hereunder assigned by the Company to perform the duties and accept the responsibilities of a higher classification of work shall be paid the minimum established rate for said classification for the time so worked, but in no event will he be paid less than twenty-five cents (25¢) per hour above the rate he was earning immediately prior to such temporary upgrading.

D. QUALIFICATIONS

* * * *

2. Inspector

An Inspector must be capable of performing the inspection work assigned to the satisfaction of the Company. Future Inspectors must pass a practical and written examination as conducted by the Company prior to assignment.

The primary duties of an Inspector shall be the overall inspection of Company flight equipment in connection with checks, repairs, and overhauls. The work of an Inspector shall also include the inspection of materials, parts, and sub-assemblies as required, but his work shall not necessarily include the inspection of materials, parts, and sub-assemblies where such inspection is required of an Aircraft Mechanic or Mechanic to accomplish his own work. The Inspector's work may also include giving classroom instructions and training to employees of any classification. He may also be required to perform any other work related to his primary duties as Inspector. An Inspector will not supervise or direct the work of lower classified employees.

* * * *

4. Aircraft Mechanic and Mechanic

(a) Aircraft Mechanic

To qualify as an Aircraft Mechanic, an employee shall possess sufficient experience and training to perform the type of work outlined below. The work of an Aircraft Mechanic shall consist of work generally recognized as Aircraft Mechanic's work performed by the Company in or about Company shops, Maintenance Base, line service stations, Company buildings, or

equipment. Such work shall include but will not be limited to checking, dismantling, overhauling, repairing, fabricating, assembling, welding, and erecting all parts of aircraft, aircraft engines, radio equipment instruments, electrical systems, heating systems, hydraulic systems, and machine tool work in connection therewith. In addition, it may include all mechanical maintenance work when performed by the Company including, but not limited to, the dismantling, repairing, fabricating, welding, altering, and maintaining of all machinery and mechanical devices, automotive equipment, ramp equipment, buildings, hanger and field storage or dispensing equipment. Aircraft Mechanics will also perform work which is incidental to their primary duties as an Aircraft Mechanic. Aircraft Mechanics will not be required to inspect parts, sub-assemblies, or completed assemblies, except to the extent necessary to determine, accomplish, and approve their own work. Aircraft Mechanics must be capable of performing the work satisfactorily and must hold the valid and necessary certificates as required by law. The present ratio (to the nearest man) of licensed Aircraft Mechanics to unlicensed Aircraft Mechanics by shifts, as required on Line Maintenance as of the date of the signing of this Agreement, will not be increased except by agreement with the Local Committee. An Aircraft Mechanic may be required to sign work records in connection with the work he performed.

* * * *

ARTICLE IX

SENIORITY

* * * *

I. An employee covered by this Agreement shall lose his seniority status and his name shall be removed from seniority list under the following conditions:

1. He resigns from the Company.
2. He resigns from a classification or steps down to accept a lower classified job or part-time job for which he is the successful bidder.
3. He is displaced and refuses to exercise his seniority rights to bump laterally into another job for which he is qualified.
4. He refuses recall to a higher classified job of more than thirty (30) days anticipated duration for which he is qualified.

Under the circumstances listed in sub-paragraph 2, 3 and 4, it is understood that he will lose only such seniority he had

earned in the classification from which he resigned, stepped down, was displaced, or refused recall, provided he shall not lose this seniority if he must change his domicile in order to bump or accept recall. This will not restrict him from bidding on future vacancies in any classification.

5. He is discharged for cause.

6. He is absent from work for two (2) consecutive work days without properly notifying the Company of the reason for his absence and not then if a satisfactory reason is given for not so notifying the Company.

7. He does not inform the Company in writing, by telegraph, or by radiogram of his intention to return to service within ten (10) days of sending out notice offering him re-employment.

8. He does not return to the service of the Company on or before a date specified in the notice from the Company offering him re-employment, which date shall not be prior to fifteen (15) days after sending such notice; provided, however, that sub-paragraphs 7 and 8 of this paragraph shall not apply to offers of temporary work of less than ninety (90) consecutive days duration.

9. He is not recalled after having been laid off from the Company for a continuous period of three (3) years. The three (3) years shall be considered broken only if an employee is recalled for a period of ninety (90) or more consecutive days.

10. He accepts a bargaining unit position not covered by this Agreement and successfully completes his probationary period. This condition is effective April 1, 1980.

11. He is presently holding a bargaining unit position not covered by this Agreement and refuses a position under this Agreement to which his seniority entitles him.

* * * *

ARTICLE XV

GRIEVANCE PROCEDURE

A. In order to properly administer this Agreement and to dispose of all disputes or grievances which may arise under this Agreement or between the parties, the following procedure shall be followed:

1. The Union will be represented by not more than one (1) properly designated steward for each shift, at any activity at which employees covered by this Agreement are located.

2. The Union will be further represented by a Local Committee based in Honolulu consisting of three (3) members elected by the local membership.

3. The Company will designate a representative at each location where persons covered by this Agreement are employed who is empowered to settle all local grievances not involving change in Company policy or interpretations or changes in the intent and purpose of this Agreement.

4. The Union and the Company will at all times keep the other party advised through written notice of any change in authorized representatives.

5. The System General chairman or his representative shall be permitted at any appropriate time to enter shops and facilities of the Company for the purpose of investigating grievances and disputes arising under the Agreement after contacting the Company officer in charge and advising him of the purpose of the visit.

B. For the presentation and adjustment of disputes or grievances that may arise, the procedure will be:

1. Any employee having a complaint or grievance in connection with the terms of this Agreement may present his complaint or grievance to the steward, or Committeeman if the steward is not available, of the Union who in turn will discuss the matter with the employee's immediate supervisor and endeavor to arrive at a satisfactory adjustment of same.

2. If the steward, or committeeman if the steward is not available, or employee is not satisfied with the decision of the employee's immediate supervisor, the matter will be referred to the Local Committee in writing on a standard grievance form. The Local Committee will then take the matter up with the official in charge at the base or station for adjustment, furnishing two (2) copies of the signed complaint to the Company representative, one (1) to be retained by the Company and one (1) to be returned to the Union representative with the written decision.

3. If the Local Committee or the System Chairman is dissatisfied with the decision of the official designated in Paragraph 2 above, the matter may be appealed to the Department Head under whose jurisdiction the employee works. Further appeal, if desired, shall be to the System Board of Adjustment as provided for in Article XVI of this Agreement.

4. In step number one, the employees' immediate supervisor will give his decision within twenty-four (24) hours after discussion of the issue. If, as a result of his decision, the Union decides to appeal, notice of such appeal accompanied by the standard grievance form must be given the official in charge at the base or station within fifteen (15) days of the date of the decision rendered in step number one. Within fifteen (15) days thereafter, hearings on the appeal between appropriate representatives of the Company and Union will be held; and a written decision on the standard grievance form will be issued by the Company to the Union within ten (10) days after the final hearing has been held and the Company may request an additional seventy-two (72) hour extension to answer the second step grievance. If the second step grievance is not answered within the required time limits, the grievance will be considered sustained for the aggrieved. If the hearing officer is away from Hawaii during this period, the Company may request an extension if the Local Grievance Committee is notified. Appeals to the third step of the grievance procedure and hearings outlined above shall conform to the time limitations set forth for appeals to step number two, and the Company representative shall issue his decision in writing on the standard grievance form within fifteen (15) days after the final presentation.

C. Grievance involving wage claims must be filed promptly after the cause giving rise to the grievance is evident, and wage claims will not be valid and collectible for a period earlier than thirty (30) days prior to the date of filing a grievance or the date the grievance arose, whichever is most recent.

D. 1. Stewards will be permitted, after reporting to their foreman or supervisor, a reasonable amount of time during their working hours to investigate or present grievances. In the event it is necessary to go to another shop, they will report in with the foreman or supervisor of the other shop before contacting the affected employees. Local Committeemen will also be allowed a reasonable amount of time for this purpose. A Local Committeeman, regardless of seniority, will be assigned to whichever shift in his work unit the Union requests, provided that such shift carries a job assignment in his work classification for which he is qualified.

2. The authorized representatives of the Union shall be

permitted at any time to enter shops and facilities of the Company supervisor and advising him of the purpose of the visit.

E. Necessary hearings and investigations called by the Company shall, insofar as possible, be conducted during regular business hours, and stewards and Local Committeemen and necessary witnesses shall not suffer loss of normal pay while attending such hearings or investigation.

F. 1. No employee covered by this Agreement shall be discharged or suspended without pay from the service without a prompt, fair and impartial hearing and may be represented and assisted at such hearing by Union representatives. A member of the Local Committee will be notified within two (2) hours from the time an employee is held out of service of the reason for such action. Within forty-eight (48) hours (excluding Saturdays, Sundays and holidays) after such verbal notification, the Union and the employee will be advised in writing of the exact charges against the employee. No later than five (5) days after the employee receives the formal written charges against him, a hearing, as noted above, will be held at a place designated by the Company at a mutually agreed date and time to determine final disciplinary action.

2. An employee who is to be questioned by Company representatives in the investigation of an incident which may result in disciplinary action being taken against him may request a Union representative to be present as an observer. The above does not apply to inquiries of employees by supervisors in the normal course of their work.

G. Any employee dissatisfied with the action of the Company in disqualifying, suspending or discharging him may appeal from such action by filing an appeal to the third step of the grievance procedure as provided for in this Agreement, and a hearing shall be held within five (5) days of submitting such appeal. Oral and written evidence may be introduced at such hearings, and witnesses may be required to testify under oath. All decisions by Company representatives and all appeals filed by the employee or Union shall be in writing and shall conform to the time limitations set forth in the second step of the grievance procedure.

H. If as a result of any hearing or appeals therefrom it is found the suspension or discharge was not justified, the employee shall be reinstated without loss of seniority and made whole for

any loss of pay he suffered by reason of his suspension or discharge, and his personnel records shall be corrected and cleared of such charge. If a suspension rather than discharge results, the employee shall have that time he has been held out of service without pay credited against his period of suspension. In determining the amount of back wages due an employee who is reinstated as a result of the procedures outlined in this Agreement, the maximum liability of the Company shall be limited to the amount of normal wages he would have earned in the service of the company had he not been discharged or suspended.

I. When it is mutually agreed that a recording is to be made or a stenographic report is to be taken by a public stenographer of any investigation or hearing provided for in this Agreement, the cost will be borne equally by both parties to the dispute. When it is not mutually agreed that a stenographic report of the proceedings be taken by a public stenographer, the stenographic record of any such investigation or hearing may be taken by either of the parties to the dispute. A copy of such stenographic record will be furnished to the other party to the dispute upon request at pro rata cost. The cost of any additional copies requested by either party shall be borne by the party requesting them, whether the stenographic record is taken by mutual agreement or otherwise.

J. No steward or Local Committee member shall serve in such capacity while he is on leave of absence.

K. Any grievance which the Company may have against the Union at any place on the system shall be presented by the Company's Chief Operating Officer or his designee to the System General Chairman. In the event the matter is not satisfactorily adjusted within two (2) weeks after such presentation, it may be appealed to the System Board of Adjustment provided for herein.

L. All time limits for appeals and decisions will be exclusive of Saturdays, Sundays, and holidays.

ARTICLE XVI

SYSTEM BOARD OF ADJUSTMENT

A. In compliance with Section 204, Title II, of the Railway Labor Act, as amended, there is hereby established a System Board of Adjustment for the purpose of adjusting disputes or grievances which may arise under the terms of this Agreement and which are properly submitted to it after all steps for settling dis-

putes and grievances as set forth in Article XV have been exhausted.

B. Unless otherwise agreed to by the Company and the Union, the System Board of Adjustment shall consist of three (3) members, one (1) appointed by the Company (hereinafter referred to as the Company Member), one (1) appointed by the Union (hereinafter referred to as the Union Member), and for each dispute one (1) member selected from a panel of potential referees in a manner agreeable to the Company and the Union (hereinafter referred to as the Neutral Member). The Company and the Union Member shall serve until their successors are duly appointed.

C. The Board shall have exclusive jurisdiction over disputes between any employee covered by this Agreement and the Company and between the Company and the Union, growing out of grievances concerning disciplinary action, rules, rates of pay, or working conditions covered by this Agreement, or any amendment or supplement thereto, or out of the interpretation or application of any terms of this Agreement, or any amendment or supplement thereto. The jurisdiction of the Board shall not extend to proposed changes in rules, basic rates of compensation, or working conditions covered by this Agreement or any amendments thereto. The Board shall not have jurisdiction or power to add to or subtract from this Agreement or any amendments thereto or any agreement between the parties.

D. The Board shall consider any dispute properly submitted to it by any employee covered by this Agreement, by the System General Chairman of the Union, or by the Chief Operating Officer of the Company when such dispute has not been previously settled in accordance with the terms provided for in this Agreement, provided that the dispute is filed with the Board within forty (40) calendar days after the procedure provided for in this Agreement has been exhausted. If a dispute is not filed within such time the action of the Company or Union shall become final and binding. The date the submission is received by the Board shall determine the order of hearing, unless the parties mutually agree otherwise.

E. The Neutral Member of the Board shall preside at meetings and hearings of the Board and shall be designated as Chairman of the System Board of Adjustment. It shall be the responsibility of the Chairman to guide the parties in the presentation of testimony, exhibits, and argument at hearings to the end that a fair, prompt, and orderly hearing of the dispute is afforded.

F. The Board shall meet in the city where the General Offices of Hawaiian Airlines, Inc., are maintained (unless a different place of meeting is agreed upon by the parties, with the consent of the Neutral).

G. All disputes properly referred to the Board for consideration shall be addressed to the Company Member and the Union Member jointly. The submissions of the dispute to the Board shall include:

1. The question or questions at issue.
2. A statement of the specific Agreement provisions which are claimed to have been violated.
3. A statement of all facts relating to the dispute which the appealing party asserts exist and alleges can be proved and which support its position.
4. The full position of the appealing party. A copy of the initial submission shall be served on the other party or parties.

H. Upon the filing of the submission with the Company Member and Union Member, the Company and Union shall within five (5) days select a Neutral Member to sit with the Board in the consideration and disposition of the case and shall advise the appealing party and interested parties of the name and address of the Neutral Member.

I. Within thirty (30) days after receipt of the appealing party's submission, the other party to the dispute shall file a Statement of Position with the Company Member, the Union Member, and the party or parties involved which shall include:

1. If the parties are unable to agree on the question or questions at issue, the other party will state the question or questions at issue.
2. All facts relating to the dispute which the party asserts exist and alleges can be proved and which support its position.
3. The party's full position.

J. Upon the filing of the Statement of Position, the appealing party shall forward a copy of the submission to the Neutral Member, and the other party to the dispute shall file with the Neutral Member a copy of the Statement of Position. All subsequent documents to be filed with the Board shall be addressed to all three members of the Board.

K. Within fifteen (15) days after the date the Statement of Position is filed with the Company Member and the Union

Member, the parties shall advise the Board of the facts on which they desire the present evidence during the hearing of the dispute before the Board unless they mutually agree not to present any evidence or oral argument. Each party shall have the opportunity at the hearing to present evidence on the facts on which the other party presents evidence. The Neutral Member may also advise the parties the facts on which he desires to have evidence. If any party does not desire to present evidence or oral argument, that party shall so advise the other party or parties and the Board within the time limits specified in this paragraph.

L. 1. As soon as the parties and the Neutral Member (Chairman) have been advised of the facts on which evidence will be presented, the Chairman shall set a date for hearing which shall be mutually satisfactory with the Union and Company Members of the Board and shall be within thirty (30) days of said date, unless the Chairman is notified that the Company and the Union have agreed to a mutually satisfactory later date. The Chairman shall give the necessary notices in writing of such hearing to the parties. The decision of the Board shall be rendered within thirty (30) days after the close of the hearing. If neither party nor the Chairman requests evidence to be presented at the hearing, hearing shall be waived except where any of the parties or the Chairman requests a hearing for the purpose of oral argument.

2. In the event neither party desires to present evidence or oral argument at the hearing, the Chairman shall be so advised within the time limits specific in Paragraph K of this Article. If there is to be no hearing for presentation of evidence or oral argument, the Chairman shall set a date for an executive session of the Board during or after which a decision shall be rendered, but in any event said decision shall be rendered within forty (40) days of the date the Chairman was advised that no evidence or oral argument would be presented.

M. Employees covered by this Agreement may be represented at Board hearings by such person or persons as they may choose and designate, and the Company may be represented by such person or persons as it may choose and designate. Evidence may be presented either orally or in writing, or both. All witnesses testifying orally or by deposition shall do so under oath. On request of individual members of the Board, the Board may, by majority vote, or shall at the request of either the Union Member or the

Company member thereof, summon any witnesses who are employed by the Company and who may be deemed necessary by the parties to the dispute or by either party or by the Board itself. The number of employee witnesses summoned at any one time shall not be greater than the number which can be spared from the operation without interference with the services of the Company.

N. A majority vote of all members of the Board shall be competent to make a decision.

O. Decisions of the Board in all cases properly referable to it shall be final and binding upon the parties to the dispute and the parties to this Agreement.

P. Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the Company or to their duly accredited representatives under the provisions of the Railway Labor Act, as amended.

Q. Each of the parties hereto will assume the compensation, travel expense, and other expenses of the Board Member selected by it and one-half (½) of the compensation, travel expense, and other expenses of the Neutral Member.

R. Each of the parties hereto will assume the compensation, travel expense, and other expenses of the witnesses called or summoned by it. Witnesses who are employees of the Company shall receive free contingent air transportation over the lines of the Company from the point of duty or assignment to the point at which they must appear as witnesses and return, to the extent permitted by law.

S. The Company Member and the Union Member, acting jointly, shall have the authority to incur such other expenses as in their judgment may be deemed necessary for the proper conduct of the business of the Board, and such expenses shall be borne one-half (½) by each of the parties hereto. Board Members who are employees of the Company shall be granted necessary leaves of absence for the performance of their duties as Board Members. So far as space is available, the Company and the Union Board Members shall be furnished free transportation over the lines of the Company for the purpose of attending meetings of the Board, to the extent permitted by law.

T. It is understood and agreed that each and every Board member shall be free to discharge his duty in an independent manner, without fear that his individual relations with the Company or

with the Union may be affected in any manner by any action taken by him in good faith in his capacity as a Board Member.

U. A stenographic report will not be made on each case on which a hearing is held unless the parties mutually agree otherwise.

V. The Chairman's copy of all transcripts and/or all records of cases will be filed at the conclusion of each case in a place to be provided by the Company and will be accessible to Board Members and to the parties.

ARTICLE XVII SAFETY AND HEALTH

A. Employees entering the service of the Company may be required to take a physical examination specified by the Company. The cost of such examination will be paid by the Company. Thereafter the Company may request an employee to submit to further physical examinations during the course of his employment or recall to service after a layoff due to reduction in force. If it becomes necessary to hold an employee out of service due to his physical condition, the Union will, on the employee's request, be fully informed of the circumstances, and every effort will be made to return the employee to service at the earliest possible date. The cost of such further examination shall be paid by the Company.

B. The Company shall institute and maintain all reasonable and necessary precautions for safeguarding the health and safety of its employees. Both the Company and the Union recognize their respective obligations to assist in the prevention, correction, and elimination of all hazardous and unhealthy working conditions and practices.

C. The Company hereby agrees to maintain safe, sanitary, and healthful working conditions in all shops and facilities and to maintain on all shifts emergency first aid equipment at a first aid station to take care of its employees in case of accident or illness. It is understood that this does not require the Company to maintain a nurse or doctor on the property, but the Company will designate a doctor to be called in an emergency.

D. The Company agrees to furnish good drinking water and sanitary fountains; the floors of the toilets and washrooms will be kept in good repair and in clean, dry, sanitary condition. Employees will cooperate in maintaining the foregoing conditions.

Shops and washrooms will be lighted in the best manner possible, consistent with the source of light available. Individual lockers will be provided for all employees where space and lockers are available. Every effort will be made as early as possible to provide space and lockers for all employees. Lockers will be made available to all employees provided Company equipment or clothing necessary in the performance of their job.

E. 1. In order to eliminate as far as possible accidents and illness, a safety committee will be established at each point on the system where employees hereunder are based, composed of a member from each department and shop. The safety committee will meet at least once a month with management in regard to safety rules, regulations and recommendations. The Union will appoint one (1) member to each neighbor island safety committee. Insofar as practical, all matters of occupational safety and health are normally to be handled directly between the designated Union safety representative(s) or committee and the designated management safety representative(s). Discussions between these parties will be directed toward the rapid and efficient solution of safety and health problems.

2. The duty of the safety committee will be to see that all applicable State and municipal safety and sanitary regulations are complied with, as well as to make recommendations for the maintenance of proper standards.

3. This committee shall receive and investigate complaints regarding unsafe and unsanitary working conditions and make recommendations concerning such complaints. The Union safety committee member(s) or representative(s) shall be allowed with permission from the immediate supervisor a reasonable amount of time during working hours without loss of pay for these purposes.

F. Proper and modern safety devices shall be provided for all employees working in hazardous or unsanitary work, such devices to be furnished by the Company. Employees will not be required to use unsafe tools or equipment or perform work that involves an imminent danger to his or any other employee's health or physical safety once a complaint has been lodged with the immediate supervisor. However, employees will be expected to report unsafe tools or equipment. An employee's refusal to perform work which is in violation of established health and safety rules, or any

local, state or federal health and safety law shall not warrant disciplinary action.

G. The Company shall make available at its expense all necessary safety devices for employees working on hazardous or unsanitary work, and employees will be required to use or wear such devices in performing such work.

H. The Company will furnish protective apparel, equipment and devices to all employees required to work with acids or chemicals that are injurious to clothing or employees.

The Company will make available at its expense appropriate aprons, gloves, and shoes for use of all employees while required to work with acids and chemicals that are injurious to clothing while such employees are engaged in such activities, and employees will be required to wear such equipment.

I. Employees injured or who become ill because of occupational hazards while at work shall be given medical attention as promptly as reasonably practicable. Employees will not be refused permission to return to work because they have not signed releases of liability pending the disposition or settlement of any claims which they may have for compensation arising out of such sickness or injury.

J. Suitable rain repellent garments and boots shall be kept available at all shops and service stations for use of employees covered by this Agreement when they are required to work outside in the rain.

K. The Company will make available at its expense, ear muffs for employees working on the line.

L. The Company will make available, at its expense, safety goggles where required and will also provide replacement of safety prescription lenses and frames broken in the act of work when worn.

M. Employees required to have x-ray examinations will be sent, if possible, during their working hours at Company expense. Time spent outside normal working hours obtaining this examination will be paid at straight time.

N. Employees will be required to wear safety equipment designated and provided for their job. Failure to wear such equipment shall be a basis for disciplinary action.

* * * *

ARTICLE XXIII**EFFECTIVE DATE AND DURATION**

This Agreement, as amended, shall become effective January 16, 1987, and shall continue in full force and effect through January 15, 1989, and shall renew itself without change unless written notice of intended change is served in accordance with Section 6, Title I, of the Railway Labor Act, as amended, sixty (60) days prior to January 15, 1989, or in accordance with the provisions of Paragraph 8, Article III, of this Agreement, by either party hereto.

APPENDIX G

AUGUST 03, 2987

BASE MAINTENANCE & ENGINEERING

JULY 31, 1987

SUSPENSION HEARING

A HEARING WAS HELD IN THE BASE MAINTENANCE
OFFICE JULY 31, 1987
AT 10:00 A.M.

REPRESENTING THE UNION: F. BAPTIST

REPRESENTING THE COMPANY: J. CULAHARA

SUSPENDED EMPLOYEE: G. NORRIS - DATE OF
HIRE: FEBRUARY 2, 1987

COMPANY OBSERVER: C. ROBINSON

THE HEARING OFFICER PRIOR TO THE START OF
THIS HEARING EMPHASIZED THE EMPLOYEE REQUEST-
ED THE LATE SCHEDULED TIME AS STATED ON THE
LETTER DATE JULY 15, 1987 NOTIFIED TO HIM.

QUESTION AT ISSUED: EMPLOYEE'S REFUSAL TO
SIGN WORK RECORDS FOR
WORK PERFORMED BY HIM;
SUBSEQUENTLY, SUSPENDED
FOR INSUBORDINATION AFTER
A DIRECT ORDER WAS GIVEN
TO DO SO.

POSITION OF UNION: EMPLOYEE REFUSAL TO SIGN
COMPANY WORK RECORD
BASED ON; HE FELT IT WAS
UNSAFE FOR WORK PER-
FORMED.

POSITION OF COMPANY: THE COMPANY IS RESPONSIBLE FOR THE AIRWORTHINESS OF IT'S AIRCRAFT AND THE PERFORMANCE OF MAINTENANCE IN ACCORDANCE WITH IT'S MANUAL, WHICH MUST ENSURE COMPLIANCE WITH THE FAR'S. ALSO, COMPETENT PERSONNEL, MR. HENRY WONG, QUALITY CONTROL INSPECTOR, WHO IS TECHNICALLY QUALIFIED TO ANALYZE, JUDGE THE MERIT OF EACH ITEM AND MAKE THE DECISION WHETHER OR NOT TO SIGN THE ITEM OFF AS AIRWORTHY.

THE BASE MAINTENANCE LINE MANAGER, MR. JUSTING CULAHARA, PERSONALLY OBSERVES THIS WORK BEING DONE TO THE EXTENT NECESSARY TO INSURE THAT IT IS BEING DONE PROPERLY. HE IS READILY AVAILABLE IN PERSON FOR CONSULTATION. HE SEES ALL AIRCRAFT IN A CONDITION SATISFACTORY TO INSPECTION SECTION PRIOR TO RELEASE FOR FLIGHT.

IN THIS CASE, THE DECISION IN SIGNING A WORK SHEET SIGNIFY ONLY IT IS COVERED BY HIS SIGNATURE. THIS WAS THE ONLY REQUISITE IN THIS CASE. A DIRECT ORDER WAS GIVEN AND HIS REFUSAL TO COMPLY BROUGHT ABOUT

THIS UNHAPPY SITUATION. MANAGEMENT HAS NEVER MANDATED FOR A "SIGN OFF" FOR WORK NOT DONE BY AN INDIVIDUAL.

DECISION:

MR. GRANT NORRIS TERMINATED AS OF THIS DAY, AUGUST 3, 1987, FOR INSUBORDINATION.

/s/ NORMAN MATSUZAKI

NORMAN MATSUZAKI
ASSISTANT DIRECTOR OF BASE
MAINTENANCE
HEARING OFFICER

NM:hpa

cc: GRANT NORRIS
IRD
A.P. WELLS
H.E. OGDEN
C. ROBINSON
H. HONMA
IAM

APPENDIX H

September 10, 1987

Mr. Grant T. Norris
1125-A 2nd Avenue, #4
Honolulu, HI 96816

Dear Mr. Norris:

I have reviewed your case file very carefully and, as the ~~next~~ appropriate individual in the chain of command, I have decided to mitigate the punishment imposed on you from discharge to suspension without pay for the period August 3, 1987 to September 15, 1987.

You are to report to duty on September 15, 1987 at 1930 hours.

This action being taken by me should not be interpreted by you as an indication that the Company condones your conduct. You are hereby warned that any further instance of failure to perform your duties in a responsible manner will result in consideration of more severe disciplinary action to include discharge.

Very truly yours,

/s/ HOWARD E. OGDEN

Howard E. Ogden
Vice President
Maintenance and Engineering

cc: Personnel
Norman Matsuzaki
Samson Poomaihealani/IAM

92-2058

No.

Supreme Court, U.S.
FILED

JUL 8 1993

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1992

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent,

and

PAUL J. FINAZZO, HOWARD E. OGDEN, and
HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court For The State Of Hawaii

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

CADES SCHUTTE FLEMING & WRIGHT
EDWARD DELAPPE BOYLE*
SUSAN OKI MOLLWAY
1000 Bishop Street, 10th Floor
Honolulu, Hawaii 96813
(808) 521-9200

Counsel for Respondent

**Counsel of Record*

QUESTION PRESENTED

Whether the Hawaii Supreme Court correctly held that an airline employee's claim, alleging that the airline fired him in violation of the public policy of the State of Hawaii when he reported the airline's dangerous maintenance practice to the Federal Aviation Administration ("FAA"), did not depend on an interpretation of the employee's collective bargaining agreement ("CBA"), and therefore was not preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and was not subject to adjudication by an arbitrator who ordinarily has no expertise in and cannot consider public interest or determine violations of law or public policy.

LIST OF INTERESTED PARTIES

Parties other than the corporations identified in the Petition are listed in the caption.

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JURISDICTION

This Court does not have jurisdiction to consider the Petition because the Hawaii Supreme Court's judgments are not "final judgments or decrees" as required by 28 U.S.C. § 1257(a). The Hawaii Supreme Court's judgments reverse orders dismissing only some of the claims brought by Respondent Grant T. Norris ("Norris") and remand those matters for trial. Other counts were not in issue on the appeal, which was based on a certification of the appealed rulings as final pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure. Petitioners had moved unsuccessfully for dismissal of the other counts on the same jurisdictional ground that led to the dismissal of the counts in issue on the appeal. Record on Appeal in *Norris v. Hawaiian Airlines, Inc.* ("R."), vol. 5, at 1-136. Because these other counts will be tried regardless of what happens with respect to the matters that are the subject of this appeal, federal issues may be raised in a subsequent appeal from any trial ruling on those other counts. Thus, it will be only after the proceedings in the trial court are completed that all of the federal issues in this case will be decided and framed for possible review by this Court. At this point, notwithstanding how the jurisdictional issue is handled on this appeal, it is impossible to say whether new twists on the jurisdictional issue may be raised with respect to the other claims that are not addressed on this appeal. It would be premature for this Court to consider selected rulings regarding federal issues at this time.

The general rule is that all federal issues in a particular case should be reviewed on certiorari at the same time. Section 1257(a) provides, in relevant part:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In interpreting the requirement of a final judgment:

The Court has noted that "[c]onsiderations of English usage as well as those of judicial policy" would justify an interpretation of the final-judgment rule to preclude review "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has been adjudicated by the highest court of the State."

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

Although the Court has acknowledged a "limited set of situations in which [the Court] has found finality as to the federal issue despite the ordering of further proceedings in the lower state courts," *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982), the Court has not expanded this limited set to include circumstances in which additional potentially appealable federal issues remain to be decided.

Thus, in *Cox Broadcasting Corp.*, the Court said:

There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 USC § 1257 [28 USCS § 1257] and has taken jurisdiction without awaiting the

completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of *other federal questions that might also require review by the Court at a later date*, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice," [citation omitted] as well as precipitate interference with state litigation.

420 U.S. at 477-78 (emphasis added).¹

Under the circumstances of the present case, neither the final judgment rule nor the justification behind the limited exceptions to the rule previously recognized by the Court would be served by granting the Petition.

¹ In *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), this Court found a Kentucky Court of Appeals judgment "final" for purposes of 28 U.S.C. § 1257, explaining:

[I]t finally disposed of the federal pre-emption issue; a reversal here would terminate the state-court action; and to permit the proceeding to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding the federal statutory policy of "requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts."

Id. at 497 n.5 (citations omitted). Here, by contrast, a ruling by this Court could not terminate the state court action. Petitioners did not obtain complete summary judgment against Norris, nor have Petitioners had the opportunity to have the highest state court review the lower state court's denial of their motion to dismiss Norris's other claims.

Norris presents the following discussion, however, in the event the Court does consider the Petition on its merits.

STATEMENT OF THE CASE

This is a wrongful discharge case. Norris was a licensed aircraft mechanic hired by Petitioner Hawaiian Airlines, Inc. ("HAL") on February 2, 1987. *Norris v. Hawaiian Airlines, Inc.*, 842 P.2d 634, 637 (Haw. 1992). Norris's license from the FAA carried an Airframe and Powerplant rating that gave him the authority to approve and return to service an aircraft after making, supervising, or inspecting certain repairs. *Id.* See also 14 C.F.R. §§ 65.85, 65.87. A mechanic approves the aircraft by signing the maintenance record. 14 C.F.R. § 43.9(a)(4). However, the mechanic may not approve for service any aircraft or part if the repair is not in accordance with the manufacturer's instructions or specifications or if the repair does not otherwise conform to the Federal Aviation Regulations ("FAR's"). 14 C.F.R. §§ 43.9, 43.13. This restriction is stated on the back of every mechanic's license. If a mechanic makes a fraudulent or intentionally false entry in a record or report required by the FAR's, the FAA may suspend or revoke the mechanic's license, or assess a civil fine. 49 U.S.C. §§ 1429, 1471; 14 C.F.R. § 43.12.

On a routine preflight inspection of one of HAL's DC-9 aircraft, Aircraft 70, in the early morning of July 15, 1987, Norris noticed that one of the main landing gear tires was worn. 842 P.2d at 638. The tire and bearing were removed, and Norris and the other mechanics present

saw that the axle sleeve underneath, which normally has a mirror-smooth surface, was scarred and grooved, with gouges and burn marks clearly visible. *Id.*

Norris and other mechanics who saw the sleeve thought it was unsafe and needed to be changed at once. *Id.* Justin Culahara, the line manager, however, ordered the mechanics to hand sand the sleeve and simply put a new bearing and tire over it. *Id.* Culahara knew the plane was to begin its schedule of flights very soon, with passengers on board. R., vol. 3, at 288-302 ¶ 12. See also R., vol. 27 (Deposition of Thomas Sealy, vol. 1, Jan. 9, 1990, at 137-41).

When Norris was about to leave at the end of his shift, Culahara ordered him to "sign off" the tire change, thereby certifying that the repair had been performed satisfactorily. 842 P.2d at 638. See also 14 C.F.R. § 43.9(a)(4). Norris refused, saying that the sleeve was unairworthy and unsafe. Culahara told Norris to sign the work order or be fired. 842 P.2d at 638. Norris refused to sign. Culahara suspended Norris on the spot, pending a termination hearing. *Id.* Aircraft 70 made its scheduled flight carrying passengers. *Id.*

When Norris returned home, he contacted the FAA to say that there was a problem with the HAL aircraft that he had serviced. *Id.* In the afternoon, after Culahara had been relieved of his shift, Norris returned to the office of Norman Matsuzaki, the Assistant Director of Base Maintenance, and Culahara's superior, to tell him what had happened. R., vol. 3, at 288-302 ¶ 18. Norris mentioned his contact with the FAA. Matsuzaki then chased Norris from his office after assuring Norris that Norris was

"gone" no matter what Norris or the union said in Norris's defense. *Id.* ¶ 19.

Norris invoked the grievance procedure outlined in Articles XV and XVI of the CBA between the International Association of Machinists and HAL. 842 P.2d at 638. The CBA provided for an employee to be discharged or disciplined only for just cause. The CBA also stated that an aircraft mechanic "may be required to sign work records in connection with the work he performs." R., vol. 5, at 42 and Appendix F to Petition.

On July 31, 1987, Norris's termination hearing was held pursuant to Article XV of the CBA. 842 P.2d at 638. Matsuzaki presided over the hearing and ruled that Norris was terminated for "insubordination." *Id.*

Norris filed a grievance regarding his termination, seeking reinstatement and back pay. Norris's union representative referred the grievance for a Step 3 hearing pursuant to the CBA. Before the hearing was conducted, however, HAL's Vice President of Maintenance and Engineering, Howard E. Ogden, wrote a letter dated September 10, 1987, offering to "mitigate" Norris's punishment to suspension without pay, but explicitly warning that "any further instance of failure to perform your duties in a responsible manner" could be punished by discharge. *Id.* at 638-39. HAL wrote to the union representative and stated that HAL's action "negates the need" for the Step 3 hearing. R., vol. 3, at 300. Norris refused to accept the reinstatement offer under the circumstances. He filed this action in state court on December 8, 1987. 842 P.2d at 639. No Step 3 hearing was held.

On August 3, 1987, after Norris had been terminated, he went back to the FAA and gave the federal agency the details of what had happened on the evening/early morning of July 14/July 15, 1987, including the location of the damaged axle sleeve. The FAA seized the axle sleeve on August 4, 1987, and began a comprehensive investigation into how long that sleeve had been on the plane and how many times the sleeve had been signed off while it was damaged. R., vol. 17 (Deposition of Richard S. Teixeira, Records of Federal Aviation Administration, Dec. 6, 1989). *See also* 842 P.2d at 638.

On March 2, 1987, the FAA proposed a civil penalty of \$964,000.00 against HAL on the basis of 958 flights the aircraft had made with the damaged sleeve. R., vol. 3, at 80-81. The FAA inspector who seized the sleeve found it to be damaged beyond allowable repair limits set out in the manufacturer's maintenance manual. *Id.*

The FAA proposed to revoke the FAA license of Culahara, the line manager who had suspended Norris. *Id.* at 83.

In September, 1987, the FAA broadened its investigation to include other HAL DC-9 Series 50 aircraft. *Id.* at 89-91. The FAA notified HAL that it intended to inspect the axle sleeves of two other aircraft, Aircraft 68 and 69, on September 21, 1987. *Id.* Before the inspection could take place, however, an FAA inspector caught HAL personnel removing the sleeves on those aircraft. *Id.* He ordered the sleeves made available to him. *Id.* HAL, however, did not turn over the sleeves; it told the FAA that it had "misplaced" or "lost" at least six of eight sleeves on the two aircraft. *Id.* The FAA then received

information indicating that the sleeves from Aircraft 68 and 69 were also damaged beyond allowable limits. *Id.* The FAA issued a formal Order of Investigation on April 13, 1988, to determine the facts surrounding the disappearing axle sleeves. *Id.*

On February 10, 1989, the FAA issued the "Woodruff Report," a report containing the findings and conclusions in accordance with the Order of Investigation. R., vol. 9, at 341-97. The Woodruff Report concluded that there was "evidence of actions on the part of certain HAL middle management personnel to intentionally take the sleeves as soon as they were removed from the aircraft." *Id.* at 380. The FAA questioned "whether HAL middle managers would take such action on their own volition." *Id.* at 383. Ultimately, HAL and the FAA reached a compromise, with the payment by HAL of \$360,000 resolving all pending charges. R., vol. 27 (Deposition of Stephen Thompson, vol. 2, Aug. 1, 1990, at 308-19, Exhibit 9). See also HAL's Answering Brief filed June 10, 1991, at 19-20 n.6.

Norris's suit against HAL alleges that his discharge was in violation of clear mandates of public policies as articulated in the Federal Aviation Act and the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. §§ 378-61 to 378-69. R., vol. 1, at 1-11. Count I of the Complaint includes the following allegation:

22. The foregoing acts constituted a discharge in violation of the public policy expressed in the Federal Aviation Act and the Federal Aviation Regulations, because they had the intent or the effect of allowing unsafe aircraft to carry passengers and of intimidating

FAA-licensed mechanics to ignore their obligations to the flying public in order to keep their jobs.

HAL removed the entire case to federal district court, R., vol. 1, at 48-91, where the question of whether federal labor law preempted Norris's claims was litigated. R., vol. 7, at 71-75. The federal court dismissed Count V of Norris's Complaint on the ground that it was preempted by federal labor law and remanded the remaining claims to state court. R., vol. 30, at 196-242. HAL moved for reconsideration, which the federal district court denied, saying:

The question under *Lingle* is whether a claim for wrongful discharge in violation of public policy is a claim derived from or dependent on the terms of a collective bargaining agreement. To state a claim for wrongful discharge in violation of public policy, an employee must show (1) that there is a clear mandate of public policy; and (2) that his discharge was motivated by reasons that contravene a clear mandate of public policy. See generally *Parnar*, 652 P.2d at 631-32; *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984) (*en banc*). Once the employee has made this threshold showing, the burden shifts to the employer to show that the discharge was for reasons other than those alleged by the employee. *Thompson*, 685 P.2d at 1089.

This cause of action, like the cause of action in *Lingle*, does not require an interpretation of the collective bargaining agreement. The public policy is not found in the collective bargaining agreement but in "a constitutional, statutory, or regulatory provision or scheme." *Parnar* at 631.

The motivation of the employer is a "purely factual" question. *Lingle*, 108 S. Ct., at 1882. To defend against the claim an employer must show that it was not motivated by a reason that contravenes public policy: "this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement.[]" *Id.* I therefore conclude that Norris's claim that HAL discharged him in violation of public policy is not preempted under *Lingle*.

R., vol. 3, at 1-136 (Exhibit I at 20-21).

In state court, HAL moved to dismiss Norris's claims on the ground that the state court lacked subject matter jurisdiction over them. The lower state court granted that motion as to Count I but not as to other counts. (Count I was based on *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982), which held that it was against the public policy of the State of Hawaii for an employer to fire an employee for reporting violations of law.) The state court certified its orders as final under Haw. R. Civ. P. 54(b). 842 P.2d at 639. Norris appealed from the judgment dismissing Count I against HAL and also appealed from rulings in favor of Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma. R., vol. 29, at 117-26. These three individuals were defendants in Civil No. 89-2904-09, with which Norris's case against HAL had been consolidated. R., vol. 18, at 407-08. The rulings in favor of Messrs. Finazzo, Ogden, and Honma had dismissed Counts I and II, both of which alleged violations of public policy.

On appeal, the Hawaii Supreme Court retained jurisdiction over Civil No. 89-2904-09 but determined that the state courts had no jurisdiction over Civil No. 87-3894-12

(Norris's case against HAL). 842 P.2d at 639 n.7. HAL then attempted to persuade the federal district court to reconsider its 1988 decision to remand the case. The federal district court denied HAL's repeated reconsideration motions and granted HAL leave to seek appellate permission to take an interlocutory appeal. The Ninth Circuit declined to permit an interlocutory appeal or to clarify the decision denying leave to file an interlocutory appeal. R., vol. 35 (Affidavit of Jennifer Cook Clark, submitted by way of supplemental Record) (Exhibits L, N, R, T). The state court ultimately reinstated orders and entered a reinstated judgment, from which Norris appealed. The Hawaii Supreme Court reversed the lower state court's judgments in *Norris v. Finazzo* and in *Norris v. HAL*. See 824 P.2d 634 (1992) and Appendices B and C to the Petition.²

ARGUMENT

I. Summary of Argument.

Petitioners frame the issue before this Court as being whether the preemption analysis in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), which

² The Petition complains that the Hawaii Supreme Court did not cite or follow *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), cert. denied, 498 U.S. 958 (1990), "[d]espite extensive briefing by both parties" of *Grote*. So that there will be no misunderstanding, Norris explains that his "extensive briefing" of the case consisted of discussion as to why *Grote* was inapplicable or, in the alternative, distinguishable, as more fully discussed below.

analyzed preemption under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, applies in the RLA preemption context. Petitioners argue that it does not, and that the Hawaii Supreme Court, in applying *Lingle*, is in conflict with several decisions of the United States Courts of Appeals. Norris submits, first, that the applicability of *Lingle* need not even be considered to sustain the Hawaii Supreme Court's decision, which is entirely consistent with this Court's subsequent decision in *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299 (1989) ("*Conrail*"). *Conrail* provides that a dispute between an employee and employer is a "minor" dispute that must be arbitrated under the RLA only if the employee's claim can be "conclusively resolved" by interpreting the CBA. Norris's claim cannot be "conclusively resolved" under the CBA.

Norris further submits that the Hawaii Supreme Court's use of *Lingle* was appropriate in any event, and that its decision can be squared with the federal decisions cited by Petitioners.

II. While Petitioners Frame the Issue Raised by Their Petition as Being Whether *Lingle* Applies to RLA Preemption Issues, Application of *Lingle* is Not Necessary to Sustain the Hawaii Supreme Court's Decision, which Finds Support in *Conrail*.

Petitioners' focus on *Lingle* as the linchpin of the Hawaii Supreme Court's decision is misplaced. Despite the Hawaii Supreme Court's discussion of *Lingle*, that case is not essential to the Hawaii Supreme Court's decision. Instead, the decision is fully supportable, without

regard to *Lingle*, under *Conrail*, a case dealing with the RLA and decided after *Lingle*, but never mentioned in the Petition.

Norris's public policy claim does not require any interpretation of the CBA at all. The claim raises the issue of whether HAL fired Norris in retaliation for his reporting of dangerous maintenance practices to the FAA. Any such discharge would have violated Hawaii's public policy, as stated in *Parnar*. Whether, as Petitioners claim, Norris was "insubordinate" would not "conclusively resolve" Norris's claim. Norris's claim turns on whether Petitioners were motivated by an intent to get rid of Norris because Norris was reporting shoddy maintenance practices.

As this Court noted in *Conrail*, the RLA governs disputes that can be classified as either "major" disputes or "minor" disputes. A "major" dispute is a dispute over the formation of a CBA or efforts to secure a CBA. A "major" dispute is resolved through collective bargaining or mediation. If those methods fail, the parties may resort to the use of economic force. *Conrail*, 491 U.S. at 302-03. A "minor" dispute is a dispute over the meaning or application of a particular provision in a CBA in the context of a specific situation. A "minor" dispute is resolved through compulsory and binding arbitration. *Id.* at 303. The dispute is "minor" if the employer's action is "arguably justified" by the CBA, but it is "major" if the employer's claims of justification under the CBA are "frivolous or obviously insubstantial." *Id.* at 307. The "distinguishing feature" of a "minor" dispute is that "the dispute may be conclusively resolved by interpreting the existing agreement." *Id.* at 306.

Petitioners agree that no "major" dispute is involved here, 842 P.2d at 641, but they contend that Norris's public policy claim raises a "minor" dispute because it falls within Articles IV and XVII of the CBA. Petitioners are incorrect.

Article IV provides that an aircraft mechanic "may be required to sign work records in connection with the work he performs." See Appendix F to the Petition. But this provision cannot "completely resolve" Norris's claim, as it does not speak to Norris's claim that Respondents' actual reason for terminating him was that he had reported HAL to the FAA, rather than that he had failed to sign a work record. As the Hawaii Supreme Court said, "[D]efendants do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the agreement nor do they point to any part of the CBA which demonstrates that the carrier and union have agreed on standards relevant to Norris's situation." 842 P.2d at 644. Norris's claim turns on Petitioners' allegedly retaliatory animus in firing him. What the parties did and what motivated them is not ascertainable by reference to the CBA.³

³ Petitioners state at page 17 of their Petition that the Hawaii Supreme Court decision requires a jury to interpret the CBA to determine whether Norris was discharged or merely suspended. This is not true at all. The hearing report contained in Appendix G to the Petition specifically concludes, "Mr. Grant Norris terminated as of this day, August 3, 1987, for insubordination." Thus, Petitioners' own document states unequivocally that a termination occurred. Following receipt of this report, Norris left Hawaii and moved to California to attend nursing school "because [he] figured that [his] career in the airline industry had ended." R., vol. 3, at 388-302, ¶ 24. It is true

Article XVII is similarly inapplicable. Article XVII refers to employee safety and sanitation and states, "An employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action." Article XVII does not concern the safety of the flying public, which Norris was trying to protect. The flying public was not a party to the CBA and simply is not considered in the CBA at all. Article XVII speaks of physical examinations for employees, clean and dry washroom floors, lights, employee lockers, unsafe and unsanitary working conditions, protective apparel, rain repellant garments, boots, ear muffs, and safety goggles. It does not mention, much less encompass, FAR's or other aviation safety issues. Therefore, Article XVII cannot be said to provide the framework for determining Norris's claim that he was fired in violation of public policy when he refused to participate in and instead reported dangerous aircraft maintenance practices. Certainly Norris's

that, after Norris had relocated and begun preparing for a new career, he received a letter from Howard Ogden "mitigat[ing] the punishment imposed on [him] from discharge to suspension without pay," but warning that "any further instance of failure to perform [his] duties in a responsible manner will result in consideration of more severe disciplinary action to include discharge." *Id.* and Appendix H to Petition. However, nothing in the CBA relates to whether such a "mitigation" has any effect at all if the employee has already moved out of the state and begun a new career, or whether a "mitigation" may threaten discharge if there is a "further instance" of irresponsibility, such as a further report to authorities of unsafe maintenance practices. Thus, the jury will not have to refer to the CBA at all in considering this "mitigation."

claim cannot be "conclusively resolved" by reference to Article XVII.

Nor would it make sense for a public policy issue to be resolved through a grievance procedure or through arbitration. Arbitrators do not make public policy. While an arbitrator may be experienced in labor law issues, such experience provides no expertise in public policy, which is typically left to courts, legislatures, and elected officials. If arbitrators could determine public policy, then the policy would not be public, for arbitration is normally a private matter in which the public has no say. Thus, Petitioners' argument at page 16 of the Petition that they have expert testimony establishing that the CBA does indeed cover Norris's public policy claim is unpersuasive. Public policy is not a subject for CBA's or for expert witnesses.⁴

⁴ The expert's testimony was not in the Record when the trial court entered its original ruling in HAL's favor in 1989. This ruling was the basis for other rulings. (The testimony was placed in the case files subsequently. R., vol. 27, Deposition of Ted T. Tsukiyama.) See *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909 (5th Cir.), cert. denied, 113 S. Ct. 98 (1992) (on appeal from summary judgment ruling, party may not rely on materials not brought to lower court's attention in connection with ruling). In addition, there is no reason that any court should rely on an expert with respect to matters of law. The courts are the ultimate authorities on matters of law. Were this case to go to trial, the expert's opinion would not even be admissible. An expert witness may testify in the form of an opinion only if his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Haw. R. Evid. 702. The expert testimony Petitioners rely on would not help the trier of fact to determine any fact in issue. See *Stewart v. Brennan*, 748 P.2d 816 (Haw. App. 1988). See also *Specht*

Faced with a CBA that does not address Norris's public policy claim, Petitioners conspicuously ignore the statement in *Conrail* that arbitration under a CBA will be required only if a dispute can be "conclusively resolved" by reference to the CBA. Instead, Petitioners argue that the Hawaii Supreme Court erroneously relied on *Lingle*. But if the Hawaii Supreme Court's decision is consistent with *Conrail*, a later case that deals specifically with the RLA, then it is difficult to see why this Court should grant certiorari to resolve the issue of whether *Lingle* applies. In fact, the Hawaii Supreme Court expressly said that the holding in *Lingle* "is virtually indistinguishable from the Supreme Court's reading of § 153 First (i) of the RLA in *Consolidated Rail*." *Norris*, 842 P.2d at 643.

Of course, Norris submits that, as he successfully argued to the Hawaii Supreme Court, *Lingle*, although decided in the LMRA context, does indeed provide guidance in this case. *Lingle* held that Section 301 of the LMRA did not preempt an employee's claim that he had been fired in violation of Illinois law in retaliation for filing a worker's compensation claim. The Court noted that the case turned on "purely factual questions" pertaining to "the conduct of the employee and the conduct and motivation of the employer," and that "this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement." 486 U.S.

v. Jensen, 853 F.2d 805 (10th Cir. 1984) (lawyer expert should not be permitted to usurp court's function by directing jury's understanding of legal standards); *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984) (prejudicial error to allow testimony of bankruptcy judge on matters of law); *Marx & Co. v. Diner's Club*, 550 F.2d 505 (2d Cir.), cert. denied, 434 U.S. 861 (1977).

at 407. The Court held that "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement." *Id.* at 410. The dispute did not have to be arbitrated because it did not require construing a CBA. *Id.* at 413.

The historical development of RLA preemption establishes that LMRA preemption principles provide guidance in the RLA context. Section 301 of the LMRA was first linked to the RLA in *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 691-92 (1963), which involved the RLA and which recognized that the CBA in question, like an LMRA contract, was a federal contract governed by federal law and enforceable in federal courts. In 1972, in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 323 (1972), this Court, reviewing an RLA case, applied concepts developed under Section 301 of the LMRA. Similar questions often arise in the LMRA and RLA contexts. Thus, for example, *Lingle* itself, decided in the LMRA context, discusses many of the same issues discussed several years earlier in the RLA context in *Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984), *appeal dismissed for want of substantial federal question*, 472 U.S. 1001 (1985). *Puchert*, like *Lingle*, involved a complaint of a discharge in retaliation for the filing of a worker's compensation claim, and, like *Lingle*, found the claim not preempted by the federal labor laws. In light of the similarity of issues raised in the LMRA and RLA contexts, it makes sense to look to LMRA preemption cases for guidance in the RLA context. It may well be this similarity that produced what the Hawaii Supreme Court found to be the near identity of the *Lingle* and *Conrail* formulations.

III. There is No Conflict Between the Decision in *Norris* and the Decisions of the United States Courts of Appeals Relied on by Petitioners.

Petitioners are incorrect in arguing that the Hawaii Supreme Court's decision is in conflict with decisions from the Fourth, Sixth, and Ninth Circuits. The facts leading to the decisions on which Petitioners rely are distinguishable from the facts in issue here, so that the Hawaii Supreme Court's decision may be squared with those decisions.

The Fourth Circuit decision on which Petitioners rely is *Lorenz v. CSX Transportation, Inc.*, 980 F.2d 263 (4th Cir. 1993), a two-to-one decision. Lorenz filed a defamation lawsuit, claiming that he was defamed when his employer posted a notice on the office bulletin board stating the rescheduled date of a hearing on charges against Lorenz of insubordination and removal or theft of company property. The hearing itself was conducted pursuant to the CBA, and Lorenz was found guilty. Pursuant to the CBA, Lorenz appealed, but he was unsuccessful. Lorenz then appealed to a public law board designated to arbitrate the matter in accordance with the provisions of the RLA, and the disciplinary action against Lorenz was reduced. In the meantime, Lorenz filed his defamation lawsuit, which was removed from state court to federal court. Because the defamation claim challenged the employer's handling of a matter governed by the CBA, the Fourth Circuit said that the issue of whether the employer had acted wrongfully had to be determined under the CBA:

Lorenz's claim is grounded in state law and, in effect, challenges CSX's conduct in the application of the investigatory procedures required by the BMW [the CBA]. The defamation claim arises from the issuance of a notice incident to the grievance process under the BMW. The BMW required the notice to be given before an employee could be disciplined. The allegedly defamatory statement is, facially, a simple recitation of the charges against Lorenz and notice of a hearing which CSX was required to hold. This act was inextricably intertwined with the grievance procedures mandated by the BMW and this dispute cannot be settled without reference to the BMW and the grievance procedures mandated by it.

Id. at 268.

Lorenz is distinguishable from *Norris*. Unlike *Norris*'s public policy claim, which turned on such purely factual issues as the employer's motivation, Lorenz's defamation claim turned on whether the employer was following the requirements of the CBA. If the CBA required the employer's actions, then the CBA would "conclusively resolve" the defamation claim. By contrast, no one is claiming that the CBA required *Norris*'s termination. To the contrary, as noted above, Petitioners claim that *Norris*'s termination was "mitigated" to a suspension. Moreover, the heart of *Norris*'s claim is that Petitioners were motivated by a desire to penalize him for reporting violations of law, a factual matter that cannot be "conclusively resolved" by even the most comprehensive review of the CBA. Thus, *Lorenz* is distinguishable from this case, and the decision by the Fourth Circuit not to

apply *Lingle* to the situation before it is in no way inconsistent with the Hawaii Supreme Court's decision. The reasoning in the *Norris* decision suggests that the Hawaii Supreme Court, faced with the facts in *Lorenz*, would similarly have found the defamation claim preempted.

The Sixth Circuit decisions cited in the Petition are even more easily distinguished than the Fourth Circuit decision. Petitioners mischaracterize *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir. 1989), as holding that "*Lingle* does not apply to RLA preemption analysis." Petition at 14. In *Smolarek*, the court applied the then-recent *Lingle* decision to hold claims of handicap discrimination not preempted by the LMRA. *Smolarek* did not address, much less distinguish, RLA preemption. In a footnote, *Smolarek* made a passing reference to *McCall v. Chesapeake & Ohio Railway Co.*, 844 F.2d 294 (6th Cir.), *cert. denied*, 488 U.S. 879 (1988), a case in which the Sixth Circuit held that the RLA preempted a state claim if resolution of the state claim would require the same factual inquiry as would be made by an arbitration board. However, *McCall* was decided before *Lingle* (although a rehearing was denied shortly after the date of the *Lingle* decision), and before *Conrail*. In its footnote in *Smolarek*, the Sixth Circuit did not, as Petitioners claim, cite *McCall* "as a case in which *Lingle*'s Section 301 preemption did not apply." Rather, the Sixth Circuit simply noted that *McCall* "did not involve the question of § 301 preemption." 879 F.2d at 1335 n.4. The Sixth Circuit did not take it upon itself to discuss whether the LMRA preemption analysis in *Lingle* applied to the RLA, as the issue was not before it and had not been addressed in *McCall*. To read into the footnote a

conflict with the analysis in the Hawaii Supreme Court's decision is to read something that is just not there.

Finally, Petitioners claim that the Hawaii Supreme Court is in conflict with Ninth Circuit decisions on the subject of RLA preemption. Petitioners cite two Ninth Circuit cases: *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094 (9th Cir. 1991), and *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), cert. denied, 498 U.S. 958 (1990). Neither case creates a conflict.

The employee in *Hubbard* alleged RICO violations (mail fraud and wire fraud) related to what she said was the defendants' defrauding of her by paying her less in disability payments than the CBA required. Obviously, her claim required interpretation of the CBA, which set forth the applicable benefits. Thus, her claim, unlike *Norris's*, was not independent of the CBA. Petitioners can give no reason for this Court to assume that, presented with the facts in *Hubbard*, the Hawaii Supreme Court would decide that case differently from the Ninth Circuit. Moreover, the Ninth Circuit, while noting that LMRA cases did not control because preemption was broader under the RLA, expressly noted that it would reach the same result under *Lingle* and other LMRA cases. There is, therefore, no reason to reconcile any alleged conflict between *Hubbard* and *Norris*.

Grote can similarly be reconciled with *Norris*. *Grote* involved a claim that an airline had forced a pilot to perjure himself in order to obtain medical certification. The airline's CBA dealt with the airline's "ability to require any of its pilots to maintain a current medical certificate." 905 F.2d at 1309. Thus, the pilot's claim

depended on whether the airline was acting within the scope of its authority as set forth in the CBA. Because the pilot's claim could be "conclusively resolved" by interpreting the CBA, it was deemed preempted. The Hawaii Supreme Court has agreed that claims that can be "conclusively resolved" by reference to a CBA are indeed preempted, so that there is no conflict between *Grote* and *Norris*.

Admittedly, *Grote*, in contrast to the Hawaii Supreme Court, rejected application of *Lingle* to the RLA context. However, because the analysis of Petitioners' authorities is in keeping with the analysis in *Norris*, this Court need not step in to address the applicability of *Lingle*. It appears that the federal circuits and state appellate courts are following the same analysis, whether purportedly following or rejecting *Lingle*.

As this brief is prepared, this Court is considering the certiorari petition in *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3481 (U.S. Dec. 22, 1992) (No. 92-1077). Although that case contained a footnote rejecting the statement in *Grote* that, as the Tenth Circuit put it, "the statutory, as opposed to contractual, origin of the RLA affects the inquiry into whether a claim requires CBA interpretation," *id.* at 467 n.5, rejection of *Grote* was neither necessary nor material to the result in *Davies*. *Davies* could have been decided exclusively under *Conrail's* "conclusively resolved" requirement with the same result.

The same is true of *Maher v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750 (N.J. 1991), which Petitioners claim is in conflict with federal decisions. *Maher*

applied *Lingle* and rejected application of the *Conrail* language providing that a dispute is a "minor" dispute subject to the grievance procedure if it is "arguably justified" by a CBA. The court in *Maier* appears to have overlooked the requirement in *Conrail* that a dispute is a "minor" dispute only if it can be "conclusively resolved" by interpretation of the CBA. *Conrail*, 491 U.S. at 305. If this "conclusively resolved" requirement is not met, the dispute is not a "minor" dispute that must be resolved under the grievance procedures set forth in the CBA. Even if the "conclusively resolved" requirement is met, a dispute may still fall outside the class of "minor" disputes unless the conduct in question is "arguably justified" by the CBA. But one need not reach the "arguably justified" issue if the "conclusively resolved" requirement is not met.

The claim in *Maier* was that an employer had fired the plaintiff in violation of state anti-discrimination and whistle-blower laws. Because the claim could not be "conclusively resolved" under the CBA, it did not present a "minor" dispute, regardless of whether the employer's conduct was "arguably justified" by the CBA. The result in *Maier* is consistent with this reading of *Conrail*, which makes reliance on *Lingle* unnecessary. Unless Petitioners are asking this Court to overrule the "conclusively resolved" requirement in *Conrail*, the authorities Petitioners rely on can be reconciled with *Norris*, *Davies*, and *Maier*, regardless of whether *Lingle* applies in the RLA context or not.

CONCLUSION

Although *Norris* submits that *Lingle* is indeed applicable in the RLA context, neither the Hawaii Supreme Court's decision nor any other decision that finds independent claims not preempted by the RLA requires application of *Lingle*. The Hawaii Supreme Court's decision may be sustained under *Conrail*, which requires that, for the RLA to preempt a claim classifiable as a "minor" dispute, the claim must be capable of being "conclusively resolved" by interpretation of a CBA. Application of this "conclusively resolved" requirement to *Norris*, to the authorities *Norris* relies on, and to Petitioners' authorities renders all of those authorities reconcilable. Petitioners are straining to manufacture a conflict not material or necessary to the Hawaii Supreme Court's decision.

Accordingly, the Court should deny the Petition for a Writ of Certiorari.

June 8, 1993

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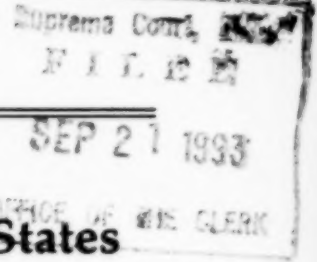
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In The
Supreme Court of the United States

October Term, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent.

AND

PAUL J. FINAZZO, HOWARD E. OGDEN and
 HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Petition For A Writ Of Certiorari
 To The Supreme Court For The State Of Hawaii

REPLY BRIEF IN SUPPORT OF
 PETITION FOR A WRIT OF CERTIORARI

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I. THE FEDERAL QUESTION PRESENTED IN THE PETITION FOR CERTIORARI IS FINAL AND PROPERLY SUBJECT TO REVIEW

Respondent contends that this Court lacks jurisdiction to grant the Petition "because the Hawaii Supreme Court's judgments are not final judgments or decrees as required by 28 U.S.C. § 1257(a)." Brief in Opposition at 1. In *Cox Broadcasting Corporation v. Cohn* ("Cox"), 420 U.S. 469, 477 (1975), this Court dictated a flexible and pragmatic approach to the "finality" requirement of 28 U.S.C. § 1257. Under that approach, a state court's judgment may be "final" even if proceedings in the state court are anticipated following disposition of the petition. Under *Cox*, the cases discussed therein, and its progeny, the Hawaii Supreme Court's judgments are "final" within the meaning of 20 U.S.C. § 1257.

Under *Cox*, the finality requirement is met "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481. The Hawaii Supreme Court's decision is "final" under this holding, for if review of the preemption question is not permitted on the present record, the issue would evade federal review.

The Petition here presents the only meaningful opportunity for review of the Hawaii court's decision on preemption. If Petitioners lost at trial, under state law they would not be permitted to reopen the preemption issue in their appeal from proceedings on the merits. See *James W. Glover, Ltd. v. Fong*, 42 Haw. 560 (1958) (law of the case prevents reexamination of questions of law in subsequent appeals between the same parties absent compelling circumstances). In a subsequent appeal the

Hawaii Supreme Court would dismiss an appeal of the preemption ruling on the basis of law of the case and thus potentially create an independent state ground for decision precluding federal review. See *North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163-64 (1973) (finality found because state proceedings on remand could result in an independent state law ground for judgment against petitioner).

Cox also recognized the finality requirement would be deemed met where delay would result in serious erosion of federal policy or needless and wasteful litigation. 420 U.S. at 482-83. Thus, in *Merchantile National Bank v. Langdeau*, 371 U.S. 555 (1963), the Court found that a state court's decision construing a venue statute to allow suit in its forum was "final" under Section 1257 because:

We believe that it serves the policy underlying the requirements of finality in 28 USC § 1257 to determine now in which state court appellants may be tried rather than subjecting them, and appellee to long complex litigation which may all be for naught if consideration of the preliminary question is postponed until the conclusion of the proceedings.

371 U.S. at 558.

Similarly, in *Construction & General Laborers' Union, Local No. 438 v. Curry*, 371 U.S. 542 (1963), this Court permitted review of a state court's issuance of a preliminary injunction to consider the question of whether the matter at issue was committed to the exclusive jurisdiction of the National Labor Relations Board. The state court judgment was held to fall

"in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

371 U.S. at 519 (quoting from *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). Applying *Curry*, this Court later held that a state decision on the issue of federal preemption was final and subject to review under Section 1257. *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n. 5 (1983).

Respondent claims *Belknap* does not apply because reversal of the instant decision would not bring an end to all claims pending in state court. Brief in Opposition at 3 n.1. However, it is clear that, for this category of "finality" to apply, it is not necessary that the entire state proceeding be brought to an end. Cox makes clear that, in order to find a decision final under this approach, it need only be dispositive of the claims under review, not the entire suit. See *Cox*, 420 U.S. at 482-83 (finality found in those cases "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come") (emphasis supplied).

Under this Court's case law, and in light of the pragmatic concerns articulated in *Cox* and its related cases, the decision of the Hawaii Supreme Court finding no preemption meets the requirements for finality under 28 U.S.C. § 1257. The Petition here provides the only meaningful opportunity for review of the preemption finding, since it will not be subject to relitigation in any subsequent state proceeding and federal review could therefore be precluded. Moreover, even if post-trial review could be assured, it would be extremely wasteful of the very resources the RLA dispute resolution procedures and the accompanying RLA preemption doctrine were designed to conserve. Reversal of the Hawaii decision by

this Court would preclude further state litigation on the relevant causes of action and would place those claims squarely within the arbitral forum mandated by federal preemption law. Petitioners, therefore, respectfully submit that the interpretation of the finality requirement of 28 U.S.C. § 1257 in *Cox* and related cases requires the rejection of Respondent's jurisdictional argument and a finding that this Court does have jurisdiction under 28 U.S.C. § 1257.

II. RESPONDENT'S RELIANCE ON CONRAIL IS MISPLACED.

Respondent urges this Court to ignore the Hawaii Court's adoption and application of the preemption test from *Lingle v. Norge Division of Magic Chef, Inc.* ("*Lingle*"), 486 U.S. 399 (1988), to RLA preemption and instead to rewrite the Hawaii court's decision applying the "major dispute/minor dispute" test set forth in *Consolidated Rail Corp. v. Railway Labor Executives' Association* ("*Conrail*"), 491 U.S. 299 (1989). Brief in Opposition at 12-18.¹

The first problem with Respondent's *Conrail* argument is that the *Conrail* test was not the test the Hawaii Supreme Court applied. Those looking to the Hawaii court for guidance and authority will find *Lingle*'s preemption test, which focuses solely on the need for interpreting a collective bargaining agreement in a state court action, when Congress clearly intended for disputes arising out of the application of such agreements in the railroad and airline industries to be conclusively settled

¹ In briefing before the Hawaii Supreme Court, Respondent himself did not focus on *Conrail* and instead urged most strenuously that *Lingle* was the appropriate test.

by arbitration.² To argue against certiorari review of an incorrect decision because it could have been decided correctly on some unarticulated grounds is to miss the importance of this Court's guidance on matters demanding certiorari review. Cf. *United Airlines, Inc. v. Mahin*, 410 U.S. 623, 630-31 (1973) (possibility that state court might have reached the same conclusion if it had decided question of state law does not create an adequate and independent state law ground relieving the Court of the necessity of review where the state court opinion does in fact address and resolve a question of federal law).

The second problem with Respondent's reliance on *Conrail* is that the decision did not address the scope of RLA preemption and is therefore inapposite to the issue presented for review. The issue in *Conrail* was whether a particular dispute – indisputably within RLA jurisdiction – was "major" and thus required the maintenance of the status quo pending bargaining procedures, or "minor" and hence referable to arbitration. 491 U.S. at 307. There was no issue of RLA preemption because there was no question whether the dispute would be resolved through RLA procedures. The language and logic of *Conrail* were not intended by this court to address the question of whether congressional intent requires preemption of state laws attempting to regulate airline or railroad employment disputes. Indeed, the decision of the New Jersey Supreme Court in *Maier v. New Jersey Rail Transit Operations, Inc.* ("*Maier*"), 53 A.2d 750 (N.J. 1991), upon which

² See H.R. Rep. No. 1944, 73rd Cong. 2d Sess. 2-3 (1934) (RLA intended to provide sufficient and effective means for the settlement of minor disputes known as "grievances, which develop from the interpretation and/or application of the contracts between the labor unions and the carriers fixing wages and working conditions").

the Hawaii court so strongly relied (Petitioners' Appendix at 23a-26a), expressly held that, since *Conrail's* discussion of minor disputes was developed in another context, it is not appropriate to apply the *Conrail* test to resolve RLA preemption issues. 593 A.2d at 758.

Respondent's reliance on *Conrail* does serve to point to another split in decisions of a state supreme court and a federal circuit court concerning the scope of RLA preemption. *Maier* expressly rejects *Conrail* as the appropriate standard for RLA preemption. *Id.* at 758. On the other hand, *Davies v. American Airlines, Inc.*, 971 F.2d 463, 465-68 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993), applies the *Conrail* test and apparently holds that only those state claims falling within the "minor dispute" test of *Conrail* are preempted. A grant of this Petition would provide an appropriate opportunity for resolving the disagreement over proper application of this Court's decision in *Conrail*.

The Hawaii court primarily relied on *Conrail* for the purpose of implicitly rejecting the so-called "omitted case" doctrine as a basis for finding preemption. See Petitioners' Appendix at 20a (court notes that RLA "minor dispute" resolution procedure could be read to include disputes "arising outside a CBA" but holds that *Conrail* rejected any such reading). The omitted case doctrine, first articulated in *Elgin, Joliet & Erie Ry. v. Burley* ("Burley"), 325 U.S. 711 (1945), held that certain matters not expressly set forth in a collective bargaining agreement may nonetheless be held committed to arbitration as "minor disputes" under the RLA. Since the Court in *Burley* did not hold that the omitted case doctrine served to define the scope of RLA preemption the Hawaii court's implicit rejection of the doctrine in the context of RLA preemption is erroneous. Moreover, as the Air Transport

Association argues, Amicus Brief at 12-13, the Hawaii court's conclusion that the omitted case doctrine was eliminated by *Conrail* is certainly questionable. Moreover, this aspect of the Hawaii Court's decision is in square conflict with the United States Court of Appeals for the Fourth Circuit's decision in *Lorenz v. CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992), which relies on the omitted case doctrine to find RLA preemption.

At its foundation, Norris' argument that the wrongful discharge claims here are not preempted because they are not "minor disputes" under the *Conrail* test is based upon the faulty premise that RLA preemption applies only to "minor disputes." Assuming *arguendo* that Norris' wrongful discharge claims are not governed by the CBA, it can hardly be gainsaid that the grounds for terminating an employee are "mandatory" subjects of bargaining. See *Japan Airlines v. IAM*, 538 F.2d 46, 51-52 (2d Cir. 1976); *NLRB v. Worster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Accordingly, if Norris' discipline was not covered by the "minor dispute" procedures of the RLA, it would certainly be covered by the "major dispute" provisions, including the restoration of the status quo pending bargaining procedures. Therefore, regardless of whether Norris' termination presented a "major" or "minor" dispute, the procedures for resolving the dispute are dictated by the RLA, and state claims and fora cannot supplant those procedures.

Of course, the facts of the instant case show conclusively that the CBA does cover the subject matter of Norris' claim. Accordingly, although this Petition could provide an appropriate opportunity for the Court to consider whether the *Conrail* test and the omitted case doctrine impact upon RLA preemption, those questions are not essential to resolution of this claim, for they never

would have been reached if RLA preemption law had been properly applied by the Hawaii Supreme Court. The claims at issue here clearly turn on an application of the CBA, since the agreement by its express terms provides for signing off on work records, and conversely provides that an employee may not be disciplined for refusing to perform work in violation of health and safety, CBA, Art. IV & Art. XVII (Petitioners' Appendix at 49a, 60a-61a). The dispute at hand was therefore expressly committed to the arbitral process under the RLA.³

III. FEDERAL AND STATE COURTS HAVE REACHED INCONSISTENT DECISIONS ON RLA PREEMPTION AND WOULD CLEARLY BENEFIT FROM GUIDANCE AND CLARIFICATION BY THIS COURT.

Respondent argues that the result in the instant cases can be squared with the decisions in *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990), and the other cases discussed in the Petition. (Brief in Opposition at 19-23). In fact, the decisions cited with approval in the Petition depart from the Hawaii

³ Respondent claims it would be inappropriate to resolve matters relating to public safety through arbitration. Brief in Opposition at 16-17. However, Congress and the federal courts have repeatedly signaled their approval of arbitral resolution of important policy matters; for example, claims involving safety issues or age, race or religious discrimination are subject to mandatory arbitration where the parties have expressly committed such matters to arbitration through collective bargaining or contracts governed by federal law. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991); *Felt v. Atchison Topeka & Santa Fe Ry.*, Civ. No. 92-4217 (D.C. C. Calif. August 18, 1993); *Newtown v. Southern Pacific Transportation Co.*, 141 L.R.R.M. (BNA) 2477 (W.D. Tex. 1992).

court's decision in *Norris* in both reasoning and result. The Hawaii Supreme Court held that *Lingle* was the proper test for determining the scope of RLA preemption, following the New Jersey Supreme Court in *Maher v. New Jersey Rail Transit Operations, Inc.*, 593 A.2d 750 (N.J. 1991), and notwithstanding the Ninth Circuit Court of Appeal's decision in *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990), and other cases expressly holding that *Lingle* does not apply to RLA preemption.

Respondent does not attempt to square the reasoning and analysis of the Hawaii decision with *Grote*; in fact, he cannot do so. He instead attempts to distinguish the Hawaii decision from *Grote* on its facts alone. Brief in Opposition at 22-23. A review of the complaints filed by *Norris* in each of the Underlying suits demonstrates that he has failed at even this more modest task.

Count I of *Norris*' complaints against Hawaiian Airlines and the Individual Defendants was premised on the discipline he was subject to for failure to sign a work record as required by Article IV, ¶ D.4(a) of the CBA. No mention is made in Count I of the Complaints of any involvement by *Norris* with the FAA or any claim by *Norris* to his supervisors that the work involved violated federal aviation regulations. Instead the complaint stated a commonplace work dispute within the clear terms of the CBA: *Norris*' supervisors directed *Norris* to sign the work record for a tire replacement, but *Norris* refused claiming that the axle sleeve was unsafe and he had not performed the work covered by the record.

In *Grote* the employee's claim arose from discipline the employee received for failing to comply with a collective bargaining agreements requirement that the employee maintain a medical certification, and the

employee claimed he was terminated for refusing to give false medical information to the FAA. *Grote* is entirely analogous to Norris' claims in Count I of the complaints: in both cases the collective bargaining agreements required specific actions by the employee which the employee refused or failed to perform based upon alleged safety concerns. The split between the Ninth Circuit and the Hawaii Supreme Court is manifest, and Norris' attempted distinction of *Grote* only serves to heighten the confusion which will inevitably exist if the Hawaii Supreme Court's decision is allowed to stand.

IV. CONCLUSION

For the reasons set forth herein and in the Petition for Certiorari, this Court should grant the Petition, set aside the decision of the Hawaii Supreme Court, and uphold the trial court's finding dismissing Count I of the complaint against Hawaiian Airlines and Counts I and II of the complaint against Paul Finazzo, Howard Ogden and Hatsuo Honma.

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No. 92-2058

Supreme Court, U.S.

FILED

JAN 5 1994

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In the Supreme Court of the United States

OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC., ET AL., PETITIONERS

v.

GRANT T. NORRIS

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF HAWAII**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondent's state tort action alleging that he was dismissed from employment as an airline mechanic because he reported safety violations is barred by 45 U.S.C. 153 First (i) and 184, which make the Railway Labor Act arbitration procedures the exclusive remedy for certain employment disputes.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2058

HAWAIIAN AIRLINES, INC., ET AL., PETITIONERS

v.

GRANT T. NORRIS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF HAWAII*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Hawaiian Airlines, Inc. (HAL), employed respondent as an aircraft mechanic. Respondent's license, issued by the Federal Aviation Administration (FAA), authorized him to approve an aircraft for service after making, supervising, or inspecting repairs. He was not authorized to approve for service any aircraft whose repairs did not conform to applicable federal regulations. A mechanic who makes a fraudulent entry in any record or report required by those regulations may have his license suspended or revoked by the FAA. Pet. App. 7a.

During a routine inspection on July 15, 1987, respondent noticed that one of the tires on an HAL DC-9 was worn. After removing the tire and bearing, he and the other mechanics noticed that the axle sleeve, which is

normally mirror-smooth, was scarred and grooved. Although respondent and the other mechanics believed that the axle sleeve was therefore unsafe and in need of replacement, respondent's supervisor, Justin Culahara, ordered the mechanics to sand the sleeve by hand and put a new bearing and tire over it. After the specified repairs were performed, the plane made its scheduled flight. Pet. App. 7a.

At the end of respondent's shift, Culahara directed him to sign the maintenance record for the installation of the tire. Under applicable federal regulations (14 C.F.R. 43.9(a)), that record served to certify whether the repair work had been satisfactorily performed. Respondent refused to sign the form on the ground that the sleeve remained unsafe. He indicated that he would sign the form only if the DC-9 manual indicated that the axle sleeve was in satisfactory condition. Culahara told respondent he would be discharged if he did not sign. When respondent persisted in his refusal, he was immediately suspended pending a termination hearing. Respondent returned home and reported to the FAA that there was a problem with an HAL aircraft that he had serviced. Pet. App. 7a-8a.

On August 3, 1987, respondent was terminated for insubordination.¹ Respondent invoked the grievance procedures available under the applicable collective bargaining agreement. The agreement provides that an employee may be discharged only for "just cause" and may not be disciplined for refusing to perform work in violation of a health or safety law. Pet. App. 8a. The grievance process proceeded to "Step 3," which entails a hearing before the head of the department in which the employee works.

¹ After respondent was terminated, he gave the FAA details of what had occurred on July 15, 1987. The FAA seized the axle sleeve on August 4, 1987, and initiated an investigation to determine how long the damaged sleeve had been on the plane. The FAA later broadened its investigation to other planes in the HAL fleet. Pet. App. 8a. On March 2, 1988, the FAA proposed a civil penalty regarding the damaged sleeve. The FAA and HAL subsequently settled the case. Pet. 4.

Id. at 9a & n.6, 51a. Prior to the hearing, however, HAL offered to reduce the punishment to suspension without pay for six weeks. Respondent never replied to the offer. *Id.* at 9a.

2. a. This case is a consolidation of two lawsuits relating to respondent's discharge. On December 8, 1987, respondent filed an action in state court against HAL. *Norris v. Hawaiian Airlines, Inc.*, Civ. No. 87-3984-12 (Haw. Cir. Ct.). He alleged that HAL discharged him in violation of the public policy expressed in the Federal Aviation Act and implementing regulations (Count I); that HAL's actions violated the Hawaii Whistleblower's Protection Act (HWPB), Haw. Rev. Stat. §§ 378-61 to 378-69 (1988) (Count II);² that HAL intentionally inflicted emotional distress on him (Count III); that HAL engaged in outrageous conduct, entitling respondent to punitive damages (Count IV); and that HAL breached the collective bargaining agreement (Count V). 12/8/87 Complaint ¶¶ 22, 28, 31, 33, 39.

HAL removed the case to the United States District Court for the District of Hawaii. On March 28, 1988, the district court dismissed Count V, holding that it was subject to the exclusive arbitral procedures of the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and therefore preempted. 3/28/88 Dist. Ct. Order 14-15. The court remanded the remainder of the claims to the state trial court. *Id.* at 16-17; Pet. App. 9a n.7.

² The Hawaii Whistleblower's Protection Act provides in pertinent part that an employer "shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because * * * [t]he employee * * * reports or is about to report to a public body * * * a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false." Haw. Rev. Stat. § 378-62(1) (1988). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. Haw. Rev. Stat. § 378-63(a) (1988).

On December 5, 1990, the state trial court dismissed Count I of the complaint against HAL, reasoning that it lacked subject matter jurisdiction because respondent's claim was preempted by the RLA. See Pet. App. 28a; 12/5/90 Haw. Cir. Ct. Order 2. The court certified its order as final under state rules of civil procedure (Haw. R. Civ. P. 54(b)) so that respondent could take an immediate appeal. 12/5/90 Haw. Cir. Ct. Order 2.³

b. On September 20, 1989, respondent filed suit against petitioners Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma, all of whom were officers of HAL when respondent was discharged. *Norris v. Finazzo*, Civ. No. 89-2094-09 (Haw. Cir. Ct.). Respondent alleged that the individual petitioners directed, confirmed, or ratified the alleged retaliatory discharge. He again sought relief on theories of discharge in violation of public policy (Count I); violation of the HWPAA (Count II); intentional infliction of emotional distress (Count III); and outrageous conduct entitling him to punitive damages (Count IV). 9/20/89 Complaint ¶¶ 22, 28, 31, 33. On December 5, 1990, the state trial court dismissed Counts I and II and certified the case for immediate appeal. 12/5/90 Haw. Cir. Ct. Order 2-3.

3. The Supreme Court of Hawaii reversed in both cases. Pet. App. 1a-26a (*Finazzo*); *id.* at 27a-29a (*Hawaiian Airlines, Inc.*). The court first observed that respondent's retaliatory discharge claims are subject to the RLA's exclusive arbitral mechanism (and are therefore preempted) if they are "minor disputes" for purposes of the RLA—*i.e.*, if they are disputes "growing out of grievances or out of the interpretation or application of agree-

³ Although the Hawaii Supreme Court vacated the initial state trial court's order because the district court's remand order was not part of the record (Pet. App. 9a n.7), the remand order was subsequently made part of the record, the judgment of dismissal was reinstated, and petitioner took a fresh appeal from that judgment. *Id.* at 28a.

ments concerning rates of pay, rules, or working conditions" (45 U.S.C. 153 First (i)). See Pet. App. 12a. The court concluded that respondent's claims are not preempted under that standard.

Relying on this Court's decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 305 (1989) (*Conrail*), the state supreme court explained that "minor disputes" are "those that 'may be conclusively resolved by interpreting the existing [collective bargaining] agreement.'" Pet. App. 14a. In the court's view, respondent's retaliatory discharge claims could not be resolved in that way: "[Respondent's] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the [collective bargaining] agreement nor do they point to any part of the [contract that] demonstrates that the carrier and union have agreed on standards relevant to [respondent's] situation." Pet. App. 19a.

The court rejected petitioners' argument that the retaliatory discharge claims were preempted because it was necessary to construe the collective bargaining agreement to determine whether HAL had terminated respondent for insubordination, and thus for "just cause." Pet. App. 18a-19a. The court emphasized that in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185, this Court held that a claim of wrongful termination in retaliation for filing a state worker's compensation claim did not require interpretation of a collective bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. Pet. App. 15a-16a. The Supreme Court of Hawaii determined that, as in *Lingle*, the claims in this case do not turn upon an interpretation of the labor contract, but

upon "purely factual questions [that] pertain[] to the conduct of the employee and the conduct and motivation of the employer." Pet. App. 19a (quoting *Lingle*, 486 U.S. at 407).

DISCUSSION

In our view, the court below correctly held that respondent's claims are not "minor disputes" subject to the RLA's exclusive system of arbitration. This Court has held that the distinguishing feature of a minor dispute is that it may be conclusively resolved by construing the collective bargaining agreement. Respondent's claims for retaliatory discharge turn on purely factual questions concerning his conduct and petitioners' motivation in terminating respondent's employment; the claims do not require resolution of the issue whether the airline had just cause under the collective bargaining agreement to dismiss respondent. For that reason, respondent was not required to resort to the exclusive arbitral mechanism of the RLA, and the state law providing him with a cause of action for retaliatory discharge is not preempted by the RLA.

There is, however, a conflict among the circuits on the question whether a state tort claim of retaliatory discharge is preempted when the employer asserts that the discharge was justified by a term of the collective bargaining agreement. Further review is therefore warranted to resolve that important and recurring issue.⁴

⁴ Respondent argues (Br. in Opp. 1-4) that the state supreme court's judgment in this case is not a "final judgment" within the meaning of 28 U.S.C. 1257(a). Although the state supreme court's judgment contemplates further proceedings in the trial court, it nevertheless is final for purposes of Section 1257(a) because "it finally disposed of the federal preemption issue" as to the claims brought before the state supreme court. *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983). Moreover, if the RLA requires the claims at issue here to be determined through arbitration under the Act, permitting the case to go forward in state court would risk eroding the federal policy of the RLA. *Id.* at 497-498 n.5;

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, was enacted, *inter alia*, to establish a mechanism for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a(5); see 45 U.S.C. 153 First (i) (establishing arbitral mechanism for such disputes); 45 U.S.C. 184 (arbitral provision for such disputes in airline industry).⁵ In resolving those so-called "minor disputes" (*Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946)).⁶ the RLA first requires the parties to resort to a carrier's "internal dispute resolution processes." *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 563 (1987); see 45 U.S.C. 153 First (i), 184. If a dispute cannot be resolved internally, either party may then refer it to "arbitration

see also *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). That conclusion, moreover, is unaffected by the fact that this Court may ultimately find that the state supreme court correctly determined that petitioner's claims are not preempted by the RLA. *Belknap*, 463 U.S. at 498 n.5 (the fact "[t]hat we affirm rather than reverse, thereby holding that federal policy would not be subverted by the [state court] proceedings, is not tantamount to a holding that we are without power to render such a judgment").

⁵ Such disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30, 33 (1957); see H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-3 (1934).

⁶ This Court adopted the "major/minor" dispute terminology "from the vocabulary of rail management and rail labor." *Conrail*, 491 U.S. at 302. The term "major dispute" refers to "disputes over the formation of collective agreements or efforts to secure them." *Burley*, 325 U.S. at 723. In the case of a "major dispute," the RLA requires the parties "to undergo a lengthy process of bargaining and mediation." *Conrail*, 491 U.S. at 302; see 45 U.S.C. 155, 156; see generally *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). Petitioners do not argue that the claims in this case constitute "major disputes."

before the National Railroad Adjustment Board * * * or before an adjustment board established by the employer and the unions representing the employees." *Conrail*, 491 U.S. at 303-304; see 45 U.S.C. 153 First (i), Second.

The submission of a dispute to arbitration is compulsory at the request of either party. 45 U.S.C. 153 First (i), Second; see 45 U.S.C. 184; see also, *e.g.*, *Conrail*, 491 U.S. at 303; *Walker v. Southern Ry.*, 385 U.S. 196, 198 (1966). The decision of an adjustment board is "final and binding." 45 U.S.C. 153 First (m), Second; see *Conrail*, 491 U.S. at 303.⁷

2. Petitioners argue (Pet. 13-15) that respondent's tort claims of retaliatory discharge should not have been adjudicated outside the arbitral process. In our view, the state supreme court correctly determined that respondent's claims—alleging that he had been discharged in violation of the public policy of the Federal Aviation Act and its implementing regulations and of the HWP—are not minor disputes subject to the exclusive arbitral mechanism of the RLA.

a. The proper framework for evaluating the existence of a minor dispute is set forth in this Court's decision in *Conrail*. In that case, the Court addressed whether a dispute about the carrier's implementation of an employee drug testing program was a "major dispute" concerning

⁷ A similar scheme exists for the airline industry, to which Congress extended the RLA in 1936. Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189; see 45 U.S.C. 181-188; *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685 (1963) (the purpose of the 1936 legislation was "to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry"). The principal difference, which is not material here, is that no national adjustment board has been established for airlines; hence, minor disputes are adjudicated exclusively by system adjustment boards formed by the airlines and the unions under 45 U.S.C. 184. See *Conrail*, 491 U.S. at 304 n.4; *Central Airlines*, 372 U.S. at 686.

a change in the collective bargaining agreement (which is subject to a RLA's bargaining and mediation provisions) or a "minor dispute" (which is subject to compulsory arbitration).

In holding that the controversy at issue was a minor dispute, the Court in *Conrail* looked "to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." 491 U.S. at 305. As the Court explained, "[t]he distinguishing feature of such a case [*i.e.*, a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Ibid.* The Court made plain, moreover, that a party may not trigger the RLA's exclusive arbitral framework merely by asserting a contractual right based on "insubstantial grounds." *Id.* at 306. Rather, when "an employer asserts a contractual right to take [a] contested action, the ensuing dispute is minor [only] if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 307.

b. The state supreme court's holding (Pet. App. 10a-20a) that respondent's tort claims for retaliatory discharge are not minor disputes is supported by *Conrail*, because those claims cannot be "conclusively resolved" (491 U.S. at 305) by interpreting the collective bargaining agreement.

Respondent's first claim—alleging retaliatory discharge in violation of public policy—requires proof that the termination of an employee "violate[d] a clear mandate of public policy." Pet. App. 20a-21a. As the Supreme Court of Hawaii explained, if HAL dismissed respondent in order to punish him for trying to rectify an alleged safety infraction, that action would violate the policy "of the Federal Aviation Act and [implementing regulations] to protect the public from shoddy repair and maintenance practices." *Id.* at 21a. Respondent's second claim, which arises under the HWP, also does not depend on the

collective bargaining agreement; it merely requires proof that HAL discharged respondent because he reported the safety infraction to the FAA. *Id.* at 21a-22a.

Accordingly, as the state supreme court explained, the tort claim in this case turned on a factual dispute about whether HAL terminated respondent based on an impermissible motive, *i.e.*, because he engaged in conduct protected by state tort law independent of any contract rights of respondent or HAL. Because a collective bargaining agreement cannot eliminate substantive legal protections provided to employees independent of the agreement (see *Buell*, 480 U.S. at 563-565; *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963); cf. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-212 (1985) (LMRA)), the tort claims in this case could not be resolved by adjudicating the distinct legal question whether there was "just cause" for respondent's discharge under the labor contract. See Pet. App. 19a. Respondent could not prevail on his tort claims merely by proving that petitioner lacked just cause to dismiss him under the collective bargaining agreement, because the torts alleged required proof of unlawful purpose to punish respondent for reporting safety violations to the FAA.⁸ Conversely, even if the state court were to find that respondent committed insubordination under the labor contract by refusing "to sign work records in connection with the work he performs" (Pet. App. 49a (Art. IV ¶ D.4(a))), that finding could not "arguably justif[y]" (*Conrail*, 491 U.S. at 307) a dis-

⁸ Petitioners contend (Pet. 14) that the collective bargaining agreement is implicated by those claims because it provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state, or federal health and safety law shall not warrant disciplinary action." Pet. App. 60a-61a (Art. XVII ¶ F). As we explain below, that claim is not preempted merely because a similar claim could also have been handled through the grievance mechanism of the RLA. See pp. 11-13, *infra*.

charge motivated by the desire to penalize respondent for reporting a safety infraction. In other words, as the court below concluded, this case does not present a minor dispute because "[respondent's] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the agreement." Pet. App. 19a.

c. Petitioners contend that the state supreme court's analysis is insufficiently protective of the RLA's exclusive arbitral mechanism. Because the "minor dispute" mechanism of the RLA applies to disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 U.S.C. 153 First (i)), petitioners argue, in effect, that a claim is preempted whenever an employer describes the factual dispute in the legal terms of the collective bargaining agreement or when the employer's conduct is or could be contested through the grievance mechanism of the contract. Pet. 13-15. That argument misconceives the statutory scheme.

i. Petitioners' broad interpretation of the RLA is inconsistent with this Court's decision in *Conrail*. There, the Court held that a minor dispute is one that may be "conclusively resolved" under the collective bargaining agreement. 491 U.S. at 305. The Court stressed, however, that a dispute may not be subject to arbitration as a minor dispute if the contract claim is insubstantial—that is, if the conduct is not even "arguably justified" under the contract. *Id.* at 306-307.

Although petitioners argue that HAL's conduct was "arguably justified" by the provision of the collective bargaining agreement requiring mechanics to sign off on work records for completed repairs, respondent would not be required to dispute that issue in this suit. As set forth above (pp. 9-10, *supra*), that issue under the collective bargaining agreement could not "conclusively

resolve" respondents' tort claims, which turn on the factual question of whether HAL terminated respondent because he reported a safety violation to the FAA.

ii. Given the breadth of the subject matter covered by a typical collective bargaining agreement,⁹ petitioners' construction of the RLA would result in an unduly broad preemption of state tort law, in contravention of this Court's precedents. Because "the text of the RLA does not mention * * * tort liability" (*Buell*, 480 U.S. at 562), it does not preempt States from adopting minimum duties through their law of torts, even if those duties relate to employment relationships covered by the RLA. That conclusion is made clear by this Court's decision in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, *supra*. There, the Court rejected the contention that the RLA preempted a state statute "protecting employees against racial discrimination." 372 U.S. at 724. As this Court emphasized, "[n]o provision in the [RLA] even mentions discrimination in hiring," and nothing in the Act "suggests that [it] places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices." *Ibid.* Because the RLA "has never been used for that purpose," this Court found that it did not preempt the state anti-discrimination statute at issue. *Ibid.*

⁹ A collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960) (citation omitted; emphasis added); accord, *Conrail*, 491 U.S. at 311-312 (a collective bargaining agreement must "govern a myriad of cases which the draftsmen cannot wholly anticipate," and its express terms are necessarily supplemented by "practice, usage and custom"). For that reason, a vast array of injuries sustained by railroad workers could theoretically be addressed by "the timely invocation of the grievance machinery." *Buell*, 480 U.S. at 564.

In light of *Colorado Anti-Discrimination Comm'n*, the compulsory arbitration provisions of the RLA do not preempt claims premised on state-law duties in areas of legitimate state concern that are independent of duties assumed under the collective bargaining agreement. Otherwise, either state regulation would be substantially displaced, or arbitrators would be required to adjudicate issues of state tort law. Neither result is consistent with this Court's cases governing the regulation of labor relations. See, e.g., *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21, 23 (1987) ("pre-emption should not be lightly inferred," because "the establishment of labor standards falls within the traditional police power of the State[s]" and "does not impermissibly intrude upon the collective-bargaining process"); *Lueck*, 471 U.S. at 212 (avoiding construction of labor statute that "would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (arbitrators exceed their authority if they premise their decisions on a source of law outside the collective bargaining agreement).¹⁰

¹⁰ To be sure, in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (Pet. 13 n.4), this Court held that an individual may contract to submit certain statutory claims to binding arbitration. However, even if the parties to the collective bargaining agreement in this case had agreed to the arbitration of state tort claims, *Gilmer* would not apply here. The Court in *Gilmer* emphasized the difference between arbitration agreements in individual contracts and those in collective bargaining agreements. As the Court explained, where arbitration "occur[s] in the context of a collective-bargaining agreement, the claimants [are] represented by their unions in the arbitration proceedings," and there is "tension between collective representation and individual statutory rights." *Id.* at 1657. *Gilmer* therefore does not undercut the analysis of *Alexander v. Gardner-Denver Co.*, *supra*, which held that the availability of arbitration under a collective bargaining agreement did not bar an individual employee from asserting personal statutory rights in court.

3. Petitioners contend (Pet. 8-9) that the Supreme Court of Hawaii erred in relying on *Lingle v. Norge Division of Magic Chef, Inc.*, *supra*, a case arising under Section 301(a) of the LMRA, 29 U.S.C. 185(a). In our view, however, *Lingle* supplies an appropriate analogy in this case.

Section 301(a) of the LMRA authorizes federal jurisdiction of "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act], or between any such labor organizations." 29 U.S.C. 185(a).¹¹ The Court in *Lingle* held that Section 301 did not preempt a state tort suit based on a retaliatory discharge for filing a worker's compensation claim. Noting that the elements of the state-law cause of action consisted of (1) dismissal of an employee and (2) a motive to deter or interfere with his filing of a worker's compensation claim, the Court concluded:

Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a non-retaliatory reason for the discharge * * *; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement.

¹¹ Under this Court's cases, disputes requiring the interpretation of labor contracts covered by Section 301 are governed by federal common law rules that preempt state rules of decision. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). In *Lingle*, this Court addressed the extent to which preemption under Section 301 extends to tort claims arising out of the employment relationship.

486 U.S. at 407. Thus, the Court found that the state tort was "'independent' of the collective-bargaining agreement" because its resolution did "not require construing [that] * * * agreement." *Ibid.* (emphasis added).

To be sure, the standard for preemption under *Lingle* (whether a state law claim requires the interpretation of a labor contract) is articulated somewhat differently from the standard for finding a minor dispute under *Conrail* (whether a dispute may be conclusively resolved by interpreting the collective bargaining agreement). It is also true that the RLA, unlike the LMRA, affirmatively calls for the arbitration of contract claims within its sweep.¹² Nevertheless, *Lingle* is instructive in the RLA context, because its analysis addresses a question common to both statutes: how to accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interest of the States in adopting standards of conduct for employers subject to their police power. Compare, *e.g.*, *Lingle*, 486 U.S. at 409 (LMRA "says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of [collective bargaining] agreements"), and *Lueck*, 471 U.S. at 212 (because LMRA "does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law," "it would be inconsistent with

¹² This distinction between the RLA and the LMRA should not be overstated. In determining when a state tort action is preempted under Section 301, this Court confronted the need to "preserve[] the central role of arbitration in our 'system of industrial self-government.'" *Lueck*, 471 U.S. at 219. The Court noted that the "need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's [preemption] holding in *Lucas Flour*," and that the standard for preemption under Section 301 must protect the parties' "federal right to decide who is to resolve contract disputes." 471 U.S. at 219. Thus, although RLA preemption protects a direct statutory right to arbitration, LMRA preemption protects the important statutory right to contract for an arbitral remedy.

congressional intent under [Section 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract"), with *Colorado Anti-Discrimination Comm'n*, 372 U.S. at 724 (RLA does not preempt state anti-discrimination law). Accordingly, while it is unclear whether the standards set forth in *Lingle* and *Conrail* would lead to the same result in every case, we believe that the Supreme Court of Hawaii properly consulted the policies underlying *Lingle* in defining the line between federal contract claims and tort claims in this case.

4. As petitioners point out (Pet. 10-12, 15-16), there is disagreement among the federal (and state) courts over whether *Lingle* should be applied in RLA cases.¹³ Certiorari would not necessarily be warranted in this case on that ground alone. The state supreme court's decision was correct under both *Lingle* and *Conrail*, and the Court therefore could resolve this case without considering the practical differences (if any) that may distinguish the *Lingle* and *Conrail* tests.

There is, however, also a conflict among the circuits on the specific question of whether a claim of retaliatory discharge is preempted by the RLA. In the aftermath of *Lingle* and *Conrail*, most courts of appeals and state supreme courts that have addressed the issue have concluded that state tort claims for retaliatory discharge are not preempted by the RLA when the claims turn on substantive rights independent of the collective bargaining

¹³ Compare, e.g., *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993) (applying *Lingle*); *Davies v. American Air Lines, Inc.*, 971 F.2d 463, 466-467 (10th Cir. 1992) (same), cert. denied, 113 S. Ct. 2439 (1993) (see note 16, *infra*); *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 4 (1st Cir. 1992) (same), cert. denied, 113 S. Ct. 980 (1993), and *Maier v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 758 (N.J. 1991) (same), with *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1097 (9th Cir. 1991) (because RLA preemption is broader than LMRA preemption, *Lingle* does not govern in RLA cases); and *Lorenz v. CSX Transportation, Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (same).

agreement. See, e.g., Pet. App. 14a-24a; *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 594-596 (5th Cir. 1993) (wrongful discharge in retaliation for seeking remedy under workers' compensation statute); *Davies v. American Air Lines, Inc.*, 971 F.2d 463, 465-468 (10th Cir. 1992) (wrongful discharge in violation of public policy against dismissal for union organizing activities), cert. denied, 113 S. Ct. 2439 (1993); *Maier v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 758 (N.J. 1991) (discharge for reporting safety violations).

In *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), cert. denied, 498 U.S. 958 (1990), however, the court of appeals reached the opposite result in a case involving a claim very similar to the claims at issue here. *Grote* filed a state law tort action alleging that his employer wrongfully discharged him because he refused to perjure himself to the Federal Air Surgeon when seeking recertification as a commercial pilot. Although the wrongful discharge claim apparently turned on the employer's motive in terminating *Grote* for reasons contrary to public policy (i.e., refusal to perjure himself before federal licensing authorities), the Ninth Circuit found the claim preempted.¹⁴ Noting that a term of the collective bargaining agreement governed the airline's right to require pilots to maintain a current medical certificate, the court of appeals concluded that "the subject of *Grote*'s claim is at least 'arguably governed' by * * * the agreement." *Id.* at 1309.¹⁵

Grote conflicts with the decision in this case. In contrast with the Ninth Circuit's approach in *Grote*, the state supreme court here refused to find respondent's tort

¹⁴ The court of appeals also held that the RLA preempted *Grote*'s claims of breach of a covenant of good faith and fair dealing, breach of contract, intentional infliction of emotional distress, defamation, and fraud. *Grote*, 905 F.2d at 1308-1310.

¹⁵ Finding the wrongful discharge claim preempted under the RLA, the court further held that the *Lingle* framework was of no assistance to *Grote* because preemption under the RLA is broader than preemption under the LMRA. *Grote*, 905 F.2d at 1309-1310.

claims preempted because a term in the collective bargaining agreement—requiring an employee to sign work records for completed repairs—arguably addressed the same circumstances giving rise to the tort claims. Pet. App. 18a-19a. And unlike the Ninth Circuit in *Grote*, the state supreme court recognized that an alleged retaliatory discharge in violation of public policy cannot “arguably [be] justified” (*Conrail*, 491 U.S. at 307) by any provision of a collective bargaining agreement, and that such tort claims turn on questions of the employer’s conduct and motivation, rather than the question of just cause under the labor contract. Pet. App. 18a-19a.

Because the issue of RLA preemption recurs frequently in cases involving retaliatory discharge—and because the scope of RLA preemption determines not only the forum but the scope of available remedies in such cases—the question presented for review in this case is of substantial importance in determining the extent to which States will be able to bring their police power to bear on employment relationships covered by the RLA. We therefore believe that certiorari is warranted to resolve the circuit conflict in retaliatory discharge cases.¹⁶ Review may also present

¹⁶ Last Term, we suggested that certiorari should not be granted in *American Airlines, Inc. v. Davies*, cert. denied, 113 S. Ct. 2439 (1993) (No. 92-1077), which presented the question whether the RLA preempted a claim of retaliatory discharge for union organizing. Because the plaintiff alleged retaliation for union organizing, he had a judicially enforceable cause of action directly under the provisions of the RLA that give employees the right to organize and bargain collectively without employer interference. See 45 U.S.C. 152 Third and Fourth; *Virginian Ry. v. System Federation No. 40, Railway Employees*, 300 U.S. 515 (1937). In our view, that claim could be maintained only under Section 152 Third and Fourth, and not under state law. But because the airline had not raised that distinct claim of preemption, there was no basis for inferring that the Tenth Circuit would have allowed Davies’ state-law claims to proceed if the employer had properly raised that distinct defense in a timely manner. Thus, there was no occasion for this Court to consider the extent to which the RLA’s arbitral mechanism under

the Court with an occasion to address the propriety of reliance on *Lingle* and principles developed under Section 301 of the LMRA in resolving preemption issues under the RLA (an issue on which the lower courts have expressed differing views (see p. 16, *supra*)), and may shed light on the proper resolution of preemption issues under the RLA in contexts other than those involving allegations of retaliatory discharges.¹⁷

45 U.S.C. 153 First (i) and 184 preempts retaliatory discharge claims properly brought under state law. 92-1077 U.S. Br. 15-19. The Court thereafter denied certiorari in *Davies*. See 113 S. Ct. 2439 (1993). Respondent’s claims in this case, by contrast, do not arise directly under the RLA.

¹⁷ We note that the issue of RLA preemption arises frequently in a variety of contexts. For example, a number of courts of appeals have held that claims for intentional infliction of emotional distress based on wrongful discharge are preempted because the claim requires a determination of whether the employer’s action was justified under the labor contract. See, e.g., *Calvert v. Trans World Airlines, Inc.*, 959 F.2d 698, 700 (8th Cir. 1992); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 844-845 (9th Cir. 1989). And in *Capraro v. United Parcel Service Co.*, 993 F.2d 328, 332 (3d Cir. 1993), the court of appeals dismissed claims of fraudulent discharge, outrageous conduct, and wrongful infliction of emotional distress on the ground that “a state claim will be preempted in any instance where resolution of the claim would involve determination of an issue that an [arbitrator] might decide on the basis of interpretation of the collective bargaining agreement, either because the employee’s claim or the employer’s defense relies on the agreement.” Although the claims at issue in this case are different, the court’s approach in *Capraro* is inconsistent with the analysis of the state supreme court in this case. This Court’s resolution of respondent’s claims therefore may shed light on the proper approach to claims of RLA preemption in various related contexts.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JANUARY 1994

JUL 23 1993

No. 92-2058

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HAWAIIAN AIRLINES, INC.,
Petitioners,

v.

GRANT T. NORRIS,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF AIR TRANSPORT ASSOCIATION OF
AMERICA AS AMICUS CURIAE IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF HAWAII**

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JULY 23, 1993

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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Petitioners,
v.

GRANT T. NORRIS,
Respondent.

MOTION OF AIR TRANSPORT ASSOCIATION
OF AMERICA FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

Pursuant to Rule 37 of this Court, the Air Transport Association of America ("ATA") moves for leave to file a brief *Amicus Curiae* in support of Hawaiian Airlines' petition for certiorari.¹ ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by United States carriers. All of ATA's members are vitally affected by state court decisions that undermine the comprehensive procedures of the Railway Labor Act ("RLA") for resolution of employment disputes.

The inconsistent preemption doctrines that now exist in the various state and federal courts needlessly spur litigation and burden the airline industry because they undermine the effectiveness and authority of Adjustment

¹ Respondent Grant T. Norris has refused to consent to the filing of ATA's *amicus* brief.

Boards created under the RLA for the prompt, orderly, and peaceful resolution of disputes. ATA is in a unique position to explain these undesirable effects upon the industry as a whole. Therefore, ATA seeks leave to support the petition for certiorari, to urge the Court to clarify the pre-emption doctrine under the Railway Labor Act, as set forth more fully in the accompanying proposed Brief.

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July 23, 1993

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HAWAIIAN AIRLINES, INC.,
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BRIEF OF AIR TRANSPORT ASSOCIATION OF
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JULY 23, 1993

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IN THE
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Petitioners,

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BRIEF OF AIR TRANSPORT ASSOCIATION OF
AMERICA AS AMICUS CURIAE IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO THE
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INTEREST OF THE AMICUS CURIAE

The Air Transport Association of America ("ATA"), is a non-profit unincorporated trade association of United States federally certificated air carriers. ATA was founded in 1936 to facilitate the exchange of ideas and information concerning matters that affect the airline industry, and to represent the member carriers in legislative, judicial and administrative matters.¹ ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a

¹ The operator members include Alaska Airlines, Aloha Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express Corp., Hawaiian Airlines, Northwest Airlines, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and USAir. Associate members are Air Canada and Canadian Airlines International.

broad variety of issues of concern to its members. ATA also works closely with the various Federal agencies that regulate the airline industry such as the Federal Aviation Administration and the Department of Transportation. ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by U.S. carriers. They employ over half a million people, and perform a vital function in the economy as a whole, transporting 452 million passengers over 447 billion miles in 1991.

Congress recognized the important role of air carriers in interstate commerce when it enacted the Federal Aviation Act and when, in 1936, it added air carriers to the coverage of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* Congress recently reemphasized the economic importance of the airline industry when it enacted legislation creating the National Commission to Ensure a Strong Competitive Airline Industry. PL 103-13, 107 Stat. 43.

All air carrier members of ATA are subject to the RLA and are vitally affected by state court decisions, such as the one below, that undermine the RLA's comprehensive procedures for resolution of employment disputes. These RLA procedures are designed to facilitate the peaceful and expeditious resolution of such disputes and to avoid interruptions to commerce. These procedures will be undermined if state and federal courts, like the Hawaii Supreme Court in this case, allow state law causes of action which overlap RLA remedies to escape preemption by the RLA. Moreover, in an era when airline losses approximate \$4 billion per year, airlines are vitally concerned with effective management of operations which cross many state lines. These operations cannot be administered efficiently when varied local laws and remedies affecting employment relationships are held to be permitted, rather than preempted by the RLA.

I. PREEMPTION OF OVERLAPPING STATE LAW IS ESSENTIAL TO PRESERVE THE AUTHORITY AND EFFECTIVENESS OF ADJUSTMENT BOARDS UNDER THE RLA

In order to avoid interruptions to interstate commerce in the vital transportation industry, the RLA established exclusive and mandatory dispute-resolution processes "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" 45 U.S.C. § 151(a)(5). These dispute resolution processes allow no room for judicial intervention.² The RLA establishes detailed procedures for selection of employee representatives, for bargaining about contract formation (so-called "major disputes"), and for arbitration of a wide range of grievances and contract interpretation issues by Adjustment Boards (so-called "minor" disputes). *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 725-27 (1945). Because the RLA procedures are exclusive

2 The railroad industry was seen as a "state within a state" that evolved its own adjustment mechanisms, in which courts were to have no role:

It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self adjustment by the railroad community of its own industrial controversies. These were certainly not expected to be solved by ill adapted judicial interferences, escape from which was indeed one of the driving motives in establishing specialized machinery of mediation and arbitration.

Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 752 (1945) (Frankfurter, J. dissenting); *IAM v. Street*, 367 U.S. 740, 760 (1961) (quoting above language with approval); see also *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978) (Court may not overturn Adjustment Board's decision on legal issue regarding tolling of statute of limitations).

and mandatory, the RLA has long been held to preempt state law which would otherwise apply to the employment relationship.³ The rights of air carriers and their employees under these RLA procedures are subject to federal common law because the "needs of the subject matter manifestly call for uniformity." *IAM v. Central Airlines*, 372 U.S. 682, 692 (1963).

As interpreted and applied below, this salutary preemption doctrine is eviscerated by application of newly emerging state law causes of action to the airline industry. The decision below allows a grievant to have two proceedings in which to challenge an adverse employment decision, and two remedies for that grievance. Under the result below, a grievant who unsuccessfully contested his discharge "for cause" in arbitration could nonetheless secure a jury trial of the same facts under State law. *E.g.*, *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993) (discharged employee loses in arbitration but is successful in state action for wrongful discharge). Even a grievant successful in arbitration may seek additional relief not contemplated under the collective bargaining agreement. *E.g.*, *Mayon v. Southern Pacific Transport Co.*, 805 F.2d 1250 (5th Cir. 1986) (discharged employee obtained reinstatement and backpay in arbitration,

3 *Union Pacific R.R. v. Price*, 360 U.S. 601, 617 (1959) (employee who fails to obtain reinstatement through Adjustment Board may not thereafter bring common law action for damages for wrongful discharge; "To say that the discharged employee may litigate the validity of his discharge in a common-law action for damages after failing to sustain his grievance before the Board is to say that Congress planned that the Board should function only to render advisory opinions, and intended the Act's entire scheme for the settlement of grievances to be regarded 'as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision * * * [a contention] inconsistent with the Act's terms, purposes and legislative history.'"). *Accord Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972) (rejecting doctrine that discharged employee's resort to Adjustment Board was optional, and that he had alternative damages remedy under state law).

then filed additional state law claims for emotional distress; state law held to be preempted). Such dual processes are inherently destructive of the process which Congress has established. The prospect of inconsistent factual findings and remedies on the same evidence between an arbitrator and a state court is sure to undermine the credibility and finality of the RLA arbitration process. RLA Adjustment Boards will become "backup" remedies, or may delay their proceedings to avoid inconsistent results. The essential purpose of mandatory arbitration under the RLA, "the prompt and orderly settlement of all disputes," is fatally undermined.⁴

This case, in fact, well illustrates the dysfunctional results of abandoning RLA preemption of state law claims. When Respondent refused to sign a work record (a task required of mechanics by Article IV, D.4a of the collective bargaining agreement), he was held out of service pending investigation (a process established by Art. XV, F.1 of the collective bargaining agreement), and the normal grievance processes were followed to determine whether he should be disciplined for violation of the work rule. Respondent defended his refusal to sign a work record attesting that he had changed a tire on the ground that another part of the tire assembly was unsafe. Respondent relied on a provision of the collective bargaining agreement which said that "[a]n

4 Keeping disputes within the RLA framework of dispute resolution enhances the value and effectiveness of the Adjustment Boards and the collective bargaining process as a whole by allowing RLA conciliation procedures to work on a broad range of controversies and promotes industrial peace. *See BRT v. Chicago R. & I. R.R.*, 353 U.S. 30, 34 (1957) (rejecting the view that parties may voluntarily use Adjustment Board but may resort to economic duress, if that seems more desirable). The Adjustment Board is an extension of the collective bargaining process; what is done there is incorporated into the labor contract for the benefit of all the employees in that craft throughout the system. *See Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 242 (1950) (settlement of dispute interpreting RLA labor contract "would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties").

employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action." Art. XVII, F.

When Respondent lost the first step of the grievance process, he appealed to the next step. Soon thereafter, he abandoned the established grievance processes and filed suit in state court, claiming that the discipline imposed on him (a discharge reduced to a six week suspension) violated public policy. The public policy violation alleged was airline safety -- the very issue specifically addressed in Art. XVII, F. The holding below thus permits Respondent to take this claim before a jury and to completely bypass the grievance mechanism and the expertise of an arbitrator knowledgeable in industry practices as to matters explicitly covered by the collective bargaining agreement. Thus, the RLA's carefully tailored system of rights, processes and remedies is rendered irrelevant by the decision below.⁵

II. THIS COURT SHOULD RESOLVE INCONSISTENT PREEMPTION STANDARDS THAT ENCOURAGE LITIGATION AND BURDEN RLA CARRIERS

State and federal courts currently employ a variety of contradictory tests in determining RLA preemption. As a result, interstate air carriers cannot be sure which employment matters are subject exclusively to arbitration and which are subject to varying State laws.

Unlike the Labor Management Relations Act ("LMRA" or "NLRA"), the RLA requires representation and

⁵ Comprehensive RLA preemption does not eliminate all substantive rights available under state law. In the typical discharge case, for example, an employee is free to argue to an arbitrator that an unlawful motive, rather than just cause, was the real reason for his discharge. The parties are free, moreover, to expressly incorporate state law protection in the collective bargaining agreement if that is their desire.

collective bargaining at rail and air carriers to be "system-wide."⁶ As a result, a single collective bargaining agreement generally applies to all of an airline's employees in one craft, throughout the United States. This Court has recognized that the needs of the subject matter manifestly call for uniformity, *IAM v. Central Airlines*, 372 U.S. at 691. Consistency and uniformity in administration of such collective bargaining agreements are greatly undermined, however, when airlines are confronted with varying standards of preemption in different state and federal courts. For example, state law claims based upon conduct similar to that alleged in this case -- discharge after the employee allegedly refused to lie regarding an FAA requirement -- have been found to be preempted by the Ninth Circuit. *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), cert. denied, 498 U.S. 958 (1990). Courts have reached inconsistent results on RLA preemption of other employment issues as well.⁷

To demonstrate the extent of the problem, and the tremendous uncertainties which it creates for RLA carriers, their unions, and their employees, ATA summarizes below

⁶ *Switchmen's Union v. National Mediation Bd.*, 135 F.2d 785, 793-95 (App. D.C.), rev'd on other grounds, 320 U.S. 297 (1943) (RLA bargaining encompasses all employees in craft without geographic limit); *Summit Airlines, Inc. v. Teamsters Local 295*, 628 F.2d 787 (2d Cir. 1980) (representation under the RLA is system-wide).

⁷ Compare *Lorenz v. CSX Transp., Inc.*, 980 F.2d 263 (4th Cir. 1992) (defamation action arising out of investigation of suspected theft is preempted because it inextricably involves RLA grievance procedures); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978) (claim of infliction of emotional distress based on alleged abuse of investigation into employee's responsibility for train accident is preempted); *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853 (D. Md. 1981) (false imprisonment and theft claims are preempted because part of RLA grievance procedure), with *McCann v. Alaska Airlines, Inc.*, 758 F. Supp. 559, 564-65 (N.D. Cal. 1991) (torts arising out of investigation of suspected employee misconduct are not inextricably intertwined with grievance procedure, no preemption found); *Merola v. National R.R. Passenger Corp.*, 683 F. Supp. 935 (S.D.N.Y. 1988) (same).

the various areas of conflict regarding the RLA preemption doctrine.

A. Lower Courts Disagree On Whether Lingle Applies To Railway Labor Act Cases

The Hawaii Supreme Court below applied the preemption standard articulated by this Court in *Lingle v. Norge Div. of Magic Chefs, Inc.*, 486 U.S. 399 (1988), a case arising under the LMRA. The plaintiff in *Lingle* alleged that the employer had unlawfully discharged her because she filed a workers' compensation claim. The Seventh Circuit held that *Lingle's* action for retaliatory discharge was preempted because it was "inextricably intertwined" with her grievance under the collective bargaining agreement, which required just cause for discharge. This Court reversed, holding that the origin of the claim, not factual parallelism, determines preemption under Section 301 of the LMRA, *i.e.* where the claim is premised in the terms of the contract, preemption is established under Section 301.

Because RLA grievance resolution is mandatory rather than voluntary,⁸ this Court has stated that RLA preemption is "stronger" than preemption under the LMRA. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 323 (1972) ("[S]ince the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes . . . stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in

⁸ Compare 45 U.S.C. § 153, 184 (under RLA all "grievances" and disputes under "agreements" referred to Adjustment) with 29 U.S.C. § 185 (under LMRA federal courts may resolve disputes arising out of labor contracts).

cases arising under that Act than it is in cases arising under § 301 of the LMRA").⁹

Many courts have applied in RLA cases the preemption standard that a state law claim "inextricably intertwined" with collective bargaining and the grievance machinery is preempted. *Lorenz v. CSX Transp. Inc.*, 980 F.2d 263 (4th Cir. 1992) (defamation claim "inextricably intertwined" with grievance procedures); *Stephens v. Norfolk & W. Ry.*, 792 F.2d 576, 580 (6th Cir.), *amended*, 811 F.2d 286 (6th Cir. 1984) ("inextricably intertwined" test); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) (employee's emotional distress claim, arising from discharge after causing train crash, is preempted because inextricably intertwined with minor dispute process).

Other courts, including the Hawaii Supreme Court in this case, have refused to find RLA preemption of state wrongful discharge claims by applying the less preemptive *Lingle* standard.¹⁰ Although the Fourth, Sixth, and Ninth

⁹ Accord, *Grote v. Trans World Airlines*, 905 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990) ("Congress made clear its interest in keeping railroad labor disputes simple and out of the reach of the often lengthy court process"); *Baylis v. Marriott Corp.*, 906 F.2d 874, 878 (2d Cir. 1990), *citing with approval*, *Baldracci v. Pratt & Whitney*, 814 F.2d 102, 106 (2d Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) ("RLA likely has greater preemptive reach than LMRA"); *McCall v. Chesapeake & Ohio Ry.*, 844 F.2d 294 (6th Cir.), *cert. denied*, 488 U.S. 879 (1988) (exercise of state power over an area of activity specifically relegated to Adjustment Boards causes a danger of conflict with national labor policy great enough to mandate preemption); *Peterson v. ALPA*, 759 F.2d 1161, 1169 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985) ("unlike preemption under the NLRA, the preemption of state law claims under the RLA has been more complete."); *Beard v. Carrollton R.R.*, 893 F.2d 117, 122 (6th Cir. 1989) ("[t]he standards under the two statutes may not be identical. . . more likely that a state claim will interfere with federal interests in the context of the RLA.")

¹⁰ *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993); *Norris v. Hawaiian Airlines*, 842 P.2d 634 (Haw.

Circuits have explicitly rejected application of *Lingle* under the RLA,¹¹ other courts, including the Tenth Circuit, have found *Lingle* applicable.¹²

If the Hawaii Supreme Court had applied the "inextricably intertwined" test, preemption would have been found, for at least two reasons. First, the agreement required Norris to sign off on work he had performed. If the inquiry under Hawaii law concerned Hawaiian Airlines' motive in disciplining Norris, the employer's defense that it had "just cause" under the collective bargaining agreement to discipline an employee who refused to sign off on work meant that the defense was "inextricably intertwined" with the CBA and RLA processes.¹³

10 (...continued)

1992); *Maher v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 759 (N.J. 1991).

11 *Croston v. Burlington N.R.R.*, 1993 U.S. App. LEXIS 15890 n.3 (9th Cir. 1993) ("preemption sweeps even broader under the RLA than under the NLRA"); *Lorenz*, 980 F.2d at 268 (4th Cir. 1992) ("The circuit courts that have considered *Lingle* in light of the RLA declined to extend its analysis beyond the NLRA context"); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 n.4 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989) ("*McCall* did not involve the question of § 301 preemption"); *McCall v. Chesapeake & O. Ry. Co.*, 844 F.2d 294, 300 (6th Cir.), *cert. denied*, 488 U.S. 879 (1988) (because of strong similarity between inquiry made by arbitration board and jury in state cause of action, the latter is "inextricably intertwined" with the grievance machinery of the collective bargaining agreement and the RLA and is preempted); *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1309 (9th Cir.) ("*Lingle* is inapposite because it deals with preemption under § 301 of the LMRA . . ."), *cert. denied*, 498 U.S. 958 (1990).

12 *Davies v. American Airlines*, 971 F.2d at 466 ("test articulated by *Lingle* . . . just as valid under the RLA as it is under the LMRA").

13 The "mixed motive" test is well established in all areas of labor law. Where motive is in issue, if the employer can prove its actions would have occurred in the absence of the protected conduct, no violation is found. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (applying mixed motive test under LMRA).

Second, the Hawaiian Airlines labor agreement expressly stated that "[a]n employee's refusal to perform work which is in violation of . . . any local, state or federal health and safety law shall not warrant disciplinary action."¹⁴ Pet. App. 112a, CBA, Art. XVIII ¶F. The Hawaii Supreme Court interpreted this provision to refer *only* to safety issues in the workplace itself, not to public safety issues such as FAA regulations. In doing so, that court intruded upon the authority of the specialized tribunal that alone may interpret RLA contracts. It is certainly "arguable" that this provision would have protected Norris had the dispute gone through Adjustment Board procedures. *E.g. Alaska Airlines, Inc. and Air Line Pilots Ass'n*, 88 AAR (Lab. Rel. Press) 0108 (1988) (Sinicropi, Arb.) (pilot who refuses to fly aircraft on grounds defect in windshield rendered it nonairworthy has discipline mitigated by Adjustment Board). Clearly, the claim of wrongful discharge under state law was inextricably intertwined with interpretation of this clause. In sum, the "inextricably intertwined" test for preemption is the appropriate test to prevent either state or federal courts from usurping the unique role the Adjustment Boards play under the RLA.¹⁵

14 The Hawaii Supreme court stated that Hawaiian Airlines had not "point[ed] to any part of the CBA which demonstrates that the carrier and union have agreed on standards relevant to Norris' situation." Given the quoted language, this conclusion is clearly erroneous.

15 The existence of an arbitrable minor dispute under the RLA turns on whether a contract "arguably governs" the dispute or whether the carrier's contract justification for its actions is not "obviously insubstantial." *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 307 (1989). This definition was developed to distinguish arbitrable minor disputes from "major" disputes of contract formation, *Elgin*, 325 U.S. 711 (1945). Nonetheless, courts deciding preemption issues frequently reason that, if a dispute is "arguably governed" by a collective bargaining agreement, it is a minor dispute for an Adjustment Board and therefore the RLA preempts state law claims. Other courts have reasoned that the minor dispute test was developed for another purpose, and should not be utilized to determine preemption. *Maher v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 758 (N.J. 1991).

B. Lower Courts Disagree On Whether RLA Arbitration Applies To Grievances Not Explicitly Covered by the Collective Bargaining Agreement

This Court stated in *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711 (1945), that minor disputes encompass not only grievances interpreting or applying the collective bargaining agreement, but also those "founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries." *Id.* at 723.¹⁶ The statute itself extends arbitration to "grievances" as well as disputes arising from the interpretation of contracts. 45 U.S. §§ 151(a)(5), 153 First (i), 184. This "omitted case" situation recognized in *Elgin* clearly is inconsistent with the NLRA preemption test of *Lingle*, because it expands mandatory arbitration beyond those claims that "arise under" a labor contract, to encompass claims that could be said to arise under state law or common law. Recently, the Fourth Circuit relied upon *Elgin*, and its so-called "omitted case" doctrine, to find preemption of certain state law claims against an RLA carrier. *Lorenz v. CSX Transp. Inc.*, 980 F.2d 263, 268 (4th Cir. 1992).

Conversely, to avoid the import of *Elgin*, the Hawaii Supreme Court held that the Court in *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299 (1989) ("*Conrail*"), implicitly abandoned the "omitted case" doctrine and more narrowly defined the matters that comprise minor disputes.¹⁷ It is difficult to credit the proposition that *Conrail* narrowed *Elgin*

¹⁶ Claims based on personal injuries, of course, usually arise under state law.

¹⁷ While acknowledging that "the term 'grievances' as used in the mandatory arbitration provision of the RLA . . . may be literally read to include disputes outside a collective bargaining agreement," the Hawaii Supreme Court nonetheless concluded that "Congress intended to affect only those disputes involving contractually defined rights." Pet. App. at 244. *Accord Davies v. American Airlines, Inc.*, 971 F.2d at 467.

in this respect, because *Conrail* itself was an "omitted case" dispute (neither management nor the union contended that any portion of the collective bargaining agreement covered the drug testing at issue there), and the Court did not cite or discuss *Elgin* or mention the "omitted case" doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted, to resolve the conflict in the lower courts on the applicability of the *Lingle* preemption doctrine under the Railway Labor Act. This Court's determination of the applicability of *Lingle* under the RLA would also resolve the split in the lower courts concerning whether *Elgin* has been implicitly narrowed or overruled by *Conrail*.

Respectfully submitted

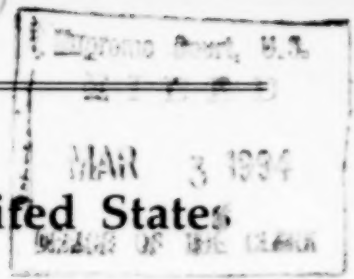
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July 23, 1993

17



In The
Supreme Court of the United States

October Term, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent,

and

PAUL J. FINAZZO, HOWARD E. OGDEN
and HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari To The
Supreme Court For The State Of Hawaii

JOINT APPENDIX

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Date Certiorari Petition Granted: January 21, 1994

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES
IN SUPREME COURT CASE NO. 92-2058

1. December 8, 1987 – Complaint Filed by Grant T. Norris ("Norris") against Hawaiian Airlines, Inc. ("HAL"), Civil No. 87-3894-12 (1st Circuit Court State of Hawaii).
2. September 20, 1989 – Complaint filed by Norris against Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma ("the Individual Defendants"), Civil No. 89-2904-09 (1st Circuit Court State of Hawaii).
3. November 1, 1989 – Entry of Order Granting in Part and Denying in Part Defendant Hawaiian Airlines, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction, Civil No. 87-3894-12 (1st Circuit Court State of Hawaii).
4. December 27, 1989 – Entry of Order Denying Plaintiff's Motion for Reconsideration as to Count I of Order Granting in Part and Denying in Part HAL's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Civil No. 87-3894-12, (1st Circuit Court State of Hawaii).
5. October 22, 1990 – Entry of Order Granting Defendants Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Civil No. 89-2904-09 (1st Circuit Court State of Hawaii).
6. December 5, 1990 – Entry of Final Judgment Pursuant to Rule 54(b) with Regard to (1) Count I of the Complaint in Civil No. 87-3894-12, and (2) Counts I and II of the Complaint in Civil No. 89-2904-09 (1st Circuit State of Hawaii).

7. July 25, 1991 - Entry of Order of Partial Dismissal of Appeal by Hawaii Supreme Court (Case No. 87-3894-12).
 8. June 30, 1992 - Entry by First Circuit Court of Reinstated Certification Order of Final Judgment Pursuant to Rule 54(b) With Regard to Count I in Case No. 87-3894-12.
 9. February 16, 1993 - Entry of Judgment of Hawaii Supreme Court Reversing Dismissal of Count I in Case No. 87-3894-12 and Dismissal of Counts I and II in Case No. 89-2904-09.
-

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,)	CIVIL NO.
Plaintiff,	)	87-3894-12
)	
vs.	)	COMPLAINT;
HAWAIIAN AIRLINES, INC.,	)	DEMAND FOR
Defendant.	)	JURY TRIAL;
	)	SUMMONS
)	
	)	(Filed
	)	Dec. 8, 1987)

COMPLAINT

1. Plaintiff GRANT T. NORRIS ("NORRIS") is a resident of the State of California.

2. Defendant HAWAIIAN AIRLINES, INC. ("HAWAIIAN AIRLINES") is a Hawaii corporation whose principal place of business is in Honolulu, Hawaii.

3. The amount of controversy in this case exceeds \$10,000.00. All relevant events in this case took place in Honolulu, Hawaii.

COUNT 1

4. From February 2, 1987 to August 3, 1987, NORRIS was employed as a mechanic by HAWAIIAN AIRLINES.

5. On or around July 14, 1987, NORRIS was assigned to service one of HAWAIIAN AIRLINES' aircraft.

6. On that date, NORRIS was properly licensed by the Federal Aviation Administration (FAA) to perform the repair work he was assigned.

7. On that date, NORRIS recommended that one of the tires in the main landing gear on the left side of the aircraft be replaced. After reporting his recommendation to the lead mechanic and obtaining the consent of HAWAIIAN AIR's inspector, NORRIS and other mechanics removed the tire assembly.

8. In the process of removing the tire assembly, NORRIS noticed that the tire assembly could be removed only with great difficulty.

9. When the tire assembly finally was removed, NORRIS noticed that the axle sleeve was scarred and grooved, with gouges clearly visible.

10. The applicable manufacturer's specifications for the axle sleeve states that the sleeve is to be removed and replaced if damage to the sleeve exceeds a depth of .005 inch. The actual damage to the axle sleeve far exceeded that amount, substantially increased the likelihood that the landing gear would fail in service, and in fact rendered the aircraft unsafe.

11. When the condition of the axle sleeve was pointed out to HAWAIIAN AIR's Base Maintenance Line Manager, he directed that the gouges on the axle sleeve be sanded down and that the aircraft be returned to service, although the axle sleeve could have been replaced in an procedure taking at most a few hours.

12. In NORRIS's professional judgment, the procedure suggested by the manager did not address the unsafe condition of the landing gear. NORRIS, accordingly, advised the lead mechanic of his opinion and that he did not want any responsibility for performing that work.

13. Personnel other than NORRIS then attempted to perform the procedure suggested by HAWAIIAN AIR's manager but were unable to do so because the axle was too hard to be sanded. The manager then directed that the tire assembly be replaced over the damaged axle sleeve and that the aircraft be returned to service in that condition. Personnel other than NORRIS performed this work, and the aircraft was returned to service. In fact, this damaged and dangerous axle sleeve remained on the aircraft until August 4, 1987, when the FAA took the axle sleeve into its custody.

14. Just before NORRIS's shift ended, the manager demanded that NORRIS sign a record of the work performed in replacing the tire and wheel.

15. Under the applicable Federal Aviation Regulations, such a signature by a licensed mechanic constituted a certification that, as to the work performed by the signer, the aircraft was fit for return to service.

16. NORRIS signed the work record relating to removal of the tire and wheel. NORRIS, however, refused to sign the work record for the balance of the work relating to replacement of the tire and wheel. NORRIS explained to the manager his reasons for refusing to sign the work record.

17. Because NORRIS did not participate in covering up the damaged axle sleeve, the manager's order to sign the work record amounted to an order that he falsify records that are required by the Federal Aviation Act and the Federal Aviation Regulations.

18. Because NORRIS reasonably believed that the covering up of the damaged axle sleeve did not render the aircraft safe for return to service, his supervisor's order to sign the work record amounted to an order that he falsely certify the safety of the aircraft and, thus, risk revocation of his FAA license.

19. Because other mechanics from HAWAIIAN AIRLINES and an inspector from HAWAIIAN AIRLINES could and did sign the work record and approve the return to service of the aircraft. Under the circumstances, the manager's order to sign the work record was completely unnecessary from HAWAIIAN AIRLINES' perspective and only served to threaten and intimidate NORRIS, or other mechanics similarly situated, into falsely certifying aircraft for return to service.

20. NORRIS was then held out of service pending an investigative hearing on a charge of insubordination, and was discharged for insubordination on August 3, 1987.

21. On September 10, 1987, HAWAIIAN AIRLINES's Vice President for Maintenance and Engineering offered to reinstate NORRIS without any back pay for the period since his discharge, and with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could be punished by discharge. At that point, however, NORRIS had become so distraught about these events that he already had decided to move to California and to change his profession.

22. The foregoing acts constituted a discharge in violation of the public policy expressed in the Federal Aviation Act and the Federal Aviation Regulations, because they had the intent or the effect of allowing unsafe aircraft to carry passengers and of intimidating FAA-licensed mechanics to ignore their obligations to the flying public in order to keep their jobs.

COUNT II

23. NORRIS incorporates by reference the allegations in paragraphs 1-21.

24. After NORRIS punched out on July 15, 1987, he telephoned the FAA to advise them that the aircraft with the damaged axle was unsafe for carrying passengers. After the FAA duty officer told NORRIS that he had no authority to inspect or impound the aircraft at that time, NORRIS went to the office of HAWAIIAN AIRLINES's Assistant Director of Base Maintenance (the "Assistant Director"). NORRIS told the Assistant Director that he had talked to the FAA but had not specifically identified the problem with the aircraft, and that all he wanted was

for the problem to be fixed so passengers' lives would not be endangered.

25. The Assistant Director then literally chased NORRIS out of his office after vowing to make certain that NORRIS was fired.

26. The Assistant Director conducted the "investigative hearing" to determine the disciplinary action appropriate for NORRIS for his refusal to sign the work record. The "investigative hearing" was a complete travesty because the Assistant Director, who clearly was predisposed to discharge NORRIS, presided over the hearing and pronounced judgment.

27. The "investigative hearing" was held on Friday, July 31, 1987. On Monday, August 3, 1987, the Assistant Director determined that NORRIS was to be discharged immediately for insubordination in refusing to obey the direct order to sign the work record.

28. HAWAIIAN AIR's acts alleged above violated the Hawaii Whistleblowers' Protection Act, Act 267 of 1987, in that NORRIS was discharged or disciplined because of his report to the FAA.

COUNT III

29. NORRIS incorporates by reference the allegations in paragraphs 1-21 and 24-27.

30. HAWAIIAN AIR's acts alleged above not only caused NORRIS financial loss but effectively destroyed his career in the airline industry.

31. HAWAIIAN AIR's acts alleged above, including the manner in which NORRIS's discharge hearing was conducted by a kangaroo court, the manner in which NORRIS was intimidated under pain of suspension and/or discharge to falsify aircraft maintenance records, and the manner in which NORRIS was threatened by the Assistant Director when the latter had been notified of NORRIS' report to the FAA, caused NORRIS severe emotional distress.

COUNT IV

32. NORRIS incorporates by reference the allegations in paragraphs 1-21, 24-27, and 30-31.

33. HAWAIIAN AIR's acts alleged above constituted outrageous acts taken with a reckless disregard of not only the professional and legal obligations of NORRIS as a FAA-licensed professional mechanic, but also of the public safety and welfare in general. HAWAIIAN AIR should be assessed punitive damages to deter such conduct.

COUNT V

34. NORRIS incorporates by reference the allegations in paragraphs 1-21, 23-27, and 30-31.

35. Throughout NORRIS's period of employment with HAWAIIAN AIRLINES, the terms and conditions of his employment were covered by a collective bargaining agreement (the "Agreement").

36. After NORRIS was discharged, he appealed the discharge decision pursuant to the terms of the Agreement, and sought reinstatement and full back pay.

37. While the appeal was pending, on September 10, 1987, HAWAIIAN AIRLINES's Vice President for Maintenance and Engineering offered to reinstate NORRIS without any back pay for the period since his discharge, and with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could be punished by discharge.

38. In a letter from HAWAIIAN AIRLINES' vice President for Administration to the vice president of NORRIS's local union dated September 14, 1987, HAWAIIAN AIRLINES took the position that the letter referred to in the previous paragraph terminated the grievance process under the collective bargaining agreement.

39. The foregoing acts of HAWAIIAN AIR constituted a breach of the collective bargaining agreement. Furthermore, in the circumstances, HAWAIIAN AIR repudiated the grievance process in the collective bargaining agreement, entitling NORRIS to bring suit for its breach.

WHEREFORE, Plaintiff demands judgment as follows:

1. General damages in an amount greater than that necessary to confer jurisdiction upon this Court.
2. Special damages in an amount to be proved at trial.
3. Punitive damages in an amount to be proved at trial.

4. Costs of suit and reasonable attorney's fees as allowed by law.

5. Such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii, DEC 8 1987.

/s/ Edward D. Boyle
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 THOMAS YAMACHIKA
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,)	CIVIL NO.
Plaintiff,	)	89-2904-09
vs.	)	COMPLAINT;
PAUL J. FINAZZO;	)	DEMAND FOR
HOWARD E. OGDEN;	)	JURY TRIAL;
HATSUO HONMA;	)	SUMMONS
and DOES 1-50,	)	(Filed
Defendants.	)	Sept. 20, 1989)
)	

COMPLAINT

1. Plaintiff GRANT T. NORRIS ("NORRIS") is a resident of the State of California.

2. Defendants PAUL J. FINAZZO and HATSUO HONMA are each residents of Hawaii. Defendant HOWARD E. OGDEN is a resident of California. Defendants DOES 1-50 are other individuals, corporations, or entities presently unknown to Plaintiff despite diligent efforts

already conducted, including examination of discovery in Civil No. 87-3894-12 in this Court.

3. The amount of controversy in this case exceeds \$10,000.00. All relevant events in this case took place in Honolulu, Hawaii.

COUNT I

4. From February 2, 1987 to August 3, 1987, NORRIS was employed as a mechanic by Hawaiian Airlines, Inc. ("HAWAIIAN AIR"), a Hawaii corporation.

5. On or around July 14, 1987, NORRIS was assigned to service one of HAWAIIAN AIR'S aircraft.

6. On that date, NORRIS was properly licensed by the Federal Aviation Administration (FAA) to perform the repair work he was assigned.

7. On that date, NORRIS recommended that one of the tires in the main landing gear on the left side of the aircraft be replaced. After reporting his recommendation to the lead mechanic and obtaining the consent of HAWAIIAN AIR's inspector, NORRIS and other mechanics removed the tire assembly.

8. In the process of removing the tire assembly, NORRIS noticed that the tire assembly could be removed only with great difficulty.

9. When the tire assembly finally was removed, NORRIS noticed that the axle sleeve was scarred and grooved, with gouges clearly visible.

10. The applicable manufacturer's specifications for the axle sleeve states that the sleeve is to be removed and

replaced if damage to the sleeve exceeds a depth of .005 inch. The actual damage to the axle sleeve far exceeded that amount, substantially increased the likelihood that the landing gear would fail in service, and in fact rendered the aircraft unsafe.

11. When the condition of the axle sleeve was pointed out to HAWAIIAN AIR's Base Maintenance Line Manager, he directed that the gouges on the axle sleeve be sanded down and that the aircraft be returned to service, although the axle sleeve could have been replaced in an procedure taking at most a few hours.

12. In NORRIS's professional judgment, the procedure suggested by the manager did not address the unsafe condition of the landing gear. NORRIS, accordingly, advised the lead mechanic of his opinion and that he did not want any responsibility for performing that work.

13. Personnel other than NORRIS then attempted to perform the procedure suggested by HAWAIIAN AIR's manager but were unable to do so because the axle was too hard to be sanded. The manager then directed that the tire assembly be replaced over the damaged axle sleeve and that the aircraft be returned to service in that condition. Personnel other than NORRIS performed this work, and the aircraft was returned to service. In fact, this damaged and dangerous axle sleeve remained on the aircraft until August 4, 1987, when the FAA took the axle sleeve into its custody.

14. Just before NORRIS's shift ended, the manager demanded that NORRIS sign a record of the work performed in replacing the tire and wheel.

15. Under the applicable Federal Aviation Regulations, such a signature by a licensed mechanic constituted a certification that, as to the work performed by the signer, the aircraft was fit for return to service.

16. NORRIS refused to sign the work record for the work relating to replacement of the tire and wheel. NORRIS explained to the manager his reasons for refusing to sign the work record.

17. Because NORRIS did not participate in covering up the damaged axle sleeve, the managers order to sign the work record amounted to an order that he falsify records that are required by the Federal Aviation Act and the Federal Aviation Regulations.

18. Because NORRIS reasonably believed that the covering up of the damaged axle sleeve did not render the aircraft safe for return to service, his supervisor's order to sign the work record amounted to an order that he falsely certify the safety of the aircraft and, thus, risk revocation of his FAA license.

19. Other mechanics from HAWAIIAN AIRLINES and an inspector from HAWAIIAN AIRLINES could and did sign the work record and approve the return to service of the aircraft. Under the circumstances, the manager's order to sign the work record was completely unnecessary from HAWAIIAN AIRLINES perspective and only served to threaten and intimidate NORRIS, or other mechanics similarly situated, into falsely certifying aircraft for return to service.

20. NORRIS was then held out of service pending an investigative hearing on a charge of insubordination,

and was discharged for insubordination on August 3, 1987, in a manner that was directed, confirmed, or ratified by FINAZZO, OGDEN, and HONMA.

21. On September 10, 1987, in a letter signed by OGDEN and received by NORRIS on September 21, 1987, HAWAIIAN AIRLINES offered to reinstate NORRIS without any back pay for the period since his discharge, and with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could be punished by discharge. At that point, however, NORRIS had become so distraught about these events that he already had decided to move to California and to change his profession.

22. The foregoing acts, which were all directed, confirmed, or ratified by FINAZZO, OGDEN, and HONMA, constituted a discharge in violation of the public policy in this State to further the goals expressed in the Federal Aviation Act and the Federal Aviation Regulations. The acts had the intent or the effect of allowing unsafe aircraft to carry passengers and of intimidating FAA-licensed mechanics to ignore their obligations to the flying public in order to keep their jobs.

COUNT II

23. NORRIS incorporates by reference the allegations in paragraphs 1-21.

24. After NORRIS punched out on July 15, 1987, he telephoned the FAA to advise them that the aircraft with the damaged axle was unsafe for carrying passengers. After the FAA duty officer told NORRIS that the officer

had no authority to inspect or impound the aircraft at that time, NORRIS went to the office of HAWAIIAN AIRLINES' Assistant Director of Base Maintenance (the "Assistant Director"). NORRIS told the Assistant Director that he had talked to the FAA but had not specifically identified the problem with the aircraft, and that all he wanted was for the problem to be fixed so passengers' lives would not be endangered.

25. The Assistant Director then literally chased NORRIS out of his office after vowing to make certain that NORRIS was fired.

26. The Assistant Director conducted the investigative hearing to determine the disciplinary action appropriate for NORRIS for his refusal to sign the work record.

27. The "investigative hearing" was held on Friday, July 31, 1987. On Monday, August 3, 1987, the Assistant Director determined that NORRIS was to be discharged immediately for insubordination in refusing to obey the direct order to sign the work record.

28. The acts alleged above, all of which were directed, confirmed, or ratified by FINAZZO, OGDEN, and HONMA, violated public policy as set forth in the Hawaii Whistleblowers' Protection Act, Act 267 of 1987, in that NORRIS was discharged or disciplined because of his report to the FAA.

COUNT III

29. NORRIS incorporates by reference the allegations in paragraphs 1-21 and 24-27.

30. The acts alleged above not only caused NORRIS financial loss but effectively destroyed his career in the airline industry.

31. The intentional acts alleged above, including the manner in which NORRIS was intimidated under pain of suspension and/or discharge to falsify aircraft maintenance records, and the manner in which NORRIS was threatened by the Assistant Director when the latter had been notified of NORRIS report to the FAA, caused NORRIS severe emotional distress. All of these acts were directed, confirmed, or ratified by FINAZZO, OGDEN, and HONMA.

COUNT IV

32. NORRIS incorporates by reference the allegations in paragraphs 1-21, 24-27, and 30-31.

33. The acts alleged above constituted outrageous acts taken with a reckless disregard of not only the professional and legal obligations of NORRIS as an FAA-licensed professional mechanic, but also of the public safety and welfare in general. Defendants should be assessed punitive damages to deter such conduct.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, as follows:

1. General damages in an amount greater than that necessary to confer jurisdiction upon this Court.

2. Special damages in an amount to be proved at trial.

3. Punitive damages in an amount to be proved at trial.

4. Costs of suit and reasonable attorney's fees as allowed by law.

5. Such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii, September 20, 1989.

/s/ Edward D Boyle
EDWARD deLAPPE BOYLE
THOMAS YAMACHIKA
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.	)	AFFIDAVIT OF
HAWAIIAN AIRLINES, INC.,	)	GRANT T.
Defendant.	)	NORRIS
)	

AFFIDAVIT OF GRANT T. NORRIS

STATE OF HAWAII	)	SS:
)	
CITY AND COUNTY OF)	
HONOLULU)	

GRANT T. NORRIS, being first duly sworn, states as follows:

1. I am the plaintiff in this action. I am making this affidavit upon person knowledge except where stated otherwise.

2. I have been, and still am, a licensed aircraft mechanic with an Airframe and Powerplant ("A&P") rating. One of the inscriptions on the back of my license reads:

REPAIRMAN OPERATIONAL RESTRICTION

The holder hereof shall not perform or approve alterations, repairs or inspections of aircraft except in accordance with the applicable airworthiness requirements of the Federal Aviation Regulations, or such method, techniques

and practices found acceptable to the Administrator.

3. From February 2, 1987 to August 3, 1987, I was employed as a mechanic be defendant Hawaiian Airlines, Inc. ("HAL").

4. In July 1987, my shift typically would start at 9 p.m. at night and end at 5:30 a.m. the next morning.

5. At approximately 3:30 a.m. on July 15, 1987, I was working on HAL's Aircraft 70 (Serial No. N709HA). I was doing a routine preflight inspection on that aircraft, and I noticed that the left No. 2 tire was worn and needed to be changed. I advised the lead mechanic who, after consulting with a HAL inspector, authorized the tire change.

6. When I and other mechanics removed the tire, we discovered that the wheel bearing was frozen or stuck onto the axle sleeve. We had difficulty removing the bearing from the axle sleeve, and we approached the lead mechanic and the inspector for their advice. We continued to be unsuccessful, and at about 4:35 a.m. the Base Maintenance Line Manager personally came over to supervise.

7. We eventually removed the bearing at about 4:45 a.m. I, and the others present, noticed that the axle sleeve was scarred and grooved, with gouges and burn marks clearly visible.

8. An axle sleeve, sometimes called an axle spacer is an aircraft part that fits snugly around the axle. It is designed to protect the axle from damage. An axle sleeve normally has an external surface that is so highly polished as to be mirror-like. I know that the reason why the

surface is so polished is so that inner race of the wheel bearing that is put on over it will spin freely around the axle sleeve. If the axle sleeve surface is uneven or damaged, the inner bearing race will bind to the axle sleeve, forcing the bearing itself to absorb all of the stress incident to take off or landing.

9. At the time I discovered the damage on July 15, 1987, I did not remember exactly what was the acceptable tolerance for damage specified in the manufacturer's manual. I knew, however, that the tolerance could not have been more than at most a few hundredths of an inch and the damage that I saw clearly exceeded that. I later found out from the FAA that the acceptable tolerance for damage is 0.005 inch.

10. I know that when an aircraft lands, the landing gear wheels will speed up from rest to approximately 150 miles per hour in a fraction of a second. The heat generated by this sudden acceleration, if absorbed by the bearing alone, could be enough to melt the bearing. If that happened, the landing gear could fail. I believed, from the scarring and burn marks on the axle sleeve, that someone had removed what must have been a completely destroyed bearing from this axle sleeve and the installed another bearing over the same sleeve.

11. At that time, there was no doubt in my mind that the part was unsafe and needed to be changed. The mechanic who was working with me on that shift agreed, as did other mechanics who were also present.

12. HAL's Base Maintenance Line Manager (whom I will refer to as the "supervisor") saw the condition of this axle sleeve. The supervisor is responsible for maintaining

the published flight schedules. The supervisor had told us that Aircraft 70 was due back on line at 6:30 a.m., which meant that the aircraft had to be out of the barn by 6:00 a.m.

13. The supervisor directed us to hand-sand the rough edges of the axle sleeve and to put a new bearing and tire on over it. At that point, I told the lead mechanic that I did not want to be responsible for reinstalling the tire.

14. Aircraft No. 70 was returned to service and in fact did carry passengers that morning.

15. At about 5:15 a.m., the supervisor approached me and asked me to sign the maintenance record for installation of the No. 2 tire. I told the supervisor that if he could show me in the maintenance manual where it said that the axle spacer was in a satisfactory condition then I would sign. I also said that I, after checking with the lead mechanic, did not actually perform the tire installation but only assisted.

16. The supervisor did not check the manual or allow me to check the manual, but told me that if I did not sign I would be suspended. I said I would not sign. I was not offered the option of signing off on the tire removal only. The supervisor suspended me on the spot, pending a termination hearing.

17. Later that morning, as soon as I got home, I telephoned the FAA to tell them that there was a problem with Aircraft 70, although I did not say what the problem was.

18. In the late morning or early afternoon of July 15, 1987, after the supervisor had gone off shift, I went back to pick up my tools and then went to the office of HAL's Assistant Director of Base Maintenance (the "Assistant Director"). While I was waiting for him, I had started to leaf through the maintenance manual, but I did not finish because the Assistant Director arrived and stopped me. The Assistant Director told me that he had heard of the events that had happened earlier that morning. I told him that I had called the FAA.

19. The Assistant Director had written a letter formally advising me that I was charged with insubordination. The Assistant Director did not let me see the maintenance manual. In fact, he literally chased me from his office, saying that whatever I or the Union said, I was "gone."

20. A true and correct copy of the letter I received, along with notations of mine requesting additional time before the hearing and the Assistant Director's acceptance of this request, is attached as Exhibit "1".

21. My termination hearing was held on July 31, 1987. That was a Friday. The decision to discharge me for insubordination was issued the following Monday, August 3, 1987.

22. A true and correct copy of the termination decision is attached as Exhibit "2." The decision indicates that copy of it was sent to HAL's Vice President for Maintenance and Engineering, Howard Ogden.

23. On September 21, 1987, I received a letter from HAL's Vice President for Maintenance and Engineering.

That letter, a true copy of which is attached as Exhibit "3", offered to reinstate me without any back pay for the period since my firing, with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could result in my getting fired again.

24. When I had gotten the letter, however, I was in California. I was preparing to attend nursing school because I figured that my career in the airline industry had ended.

25. The attached Exhibit "5" is a true and correct copy of the page of my collective bargaining agreement containing Article XV, Paragraph H.

Further affiant sayeth naught.

/s/ Grant T. Norris
GRANT T. NORRIS

Subscribed and sworn to before me
this 5th day of January, 1988.

/s/ Monica G. L. illegible
Notary Public, State of Hawaii

My commission expires: 9/29/89

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

In the Matter of the
Investigation of Hawaiian
Airlines, Inc.

Report of Formal Investigation Conducted Under
Part 13 of the Federal Aviation Regulations Relating to
the Inspection and Removal of the Main Landing Gear
Wheel Assemblies on Civil Aircraft N689HA and
N699HA on September 18 - 20, 1987.

/s/ Frederick C. Woodruff Feb 10 1989
Frederick C. Woodruff Date
Presiding Officer

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I. INTRODUCTION

This report of Formal Investigation consists of four separate parts. Part I is the Introduction; Part II is a Statement of the Investigation; Part III is a statement of Facts; and Part IV is a discussion of issues raised in the order of investigation.

This Introduction is intended to accomplish two purposes. First, it sets forth the underlying philosophy used by me in preparing this report. In general, the Report is intended to constitute as complete a discussion of the information obtained during the investigation as is possible. For this reason, where there is conflicting evidence on a particular point, I have attempted to summarize both sides. In some portions of the Report, I have made certain determinations in the form of findings of fact. This is particularly so in Part III and in some portions of Part IV. However, where the ultimate determination rests on a finding of credibility, I have not made ultimate conclusions but rather have discussed and analyzed all of the evidence. In certain areas, I have also found that further inquiry either in the form of additional expert analysis of evidence developed in this investigation or agency consideration of evidence in other related cases

might assist in clarifying these issues. This additional review or evidence is considered to be necessarily beyond the scope of this investigation. For this reason, I have described the additional investigation that could be conducted and left the ultimate conclusions to be made after it is determined whether such additional investigation should or can be accomplished.

The Introduction also lists the various parts of the Report and describes the content and purpose of each part. In doing this, I have attempted to indicate what is covered in each individual section. Part II of the report contains a narrative of how the investigation was conducted – it covers the methods utilized, the rulings made by me and the rights afforded to Hawaiian Airlines (hereafter referred to as HAL). Part III is a general narrative of the facts surrounding the incident which is the subject of this investigation. The findings of facts set forth in this part are considered by me to be either established by uncontroverted evidence or by a preponderance of reliable and conclusive evidence. Part IV is analysis of the several specific issues which I was directed to investigate in this case. For the reasons covered above, my approach in this part is to discuss and analyze the evidence adduced during the investigation and to describe certain additional investigation or expert analysis which is considered beyond the scope of this investigation and which would assist in a final decision. With the exception of the first portion of Part IV A, I have deferred making ultimate determinations. The report also discusses certain legal precedent.

Various attachments are a part of this report and are specifically described in the body of the report. These

generally consist of a listing of specific facts in greater detail or actual evidence or correspondence generated as a part of the investigation. The attachments have been physically included as a part of this report with the exception of Attachment 4 which consists of the depositions. Because of their volume, the Depositions have not been physically reproduced and attached to the report itself. HAL has a copy of these depositions and the originals are on file at the Office of the Assistance Chief Counsel for the Western-Pacific Region. Also, the records referred to in Attachment 2 are maintained at the same office.

II. CONDUCT OF THE INVESTIGATION

This investigation was initiated pursuant to an Order of Investigation issued by DeWitte T. Lawson, Jr., Regional Counsel, Federal Aviation Administration (FAA), Western-Pacific Region on April 13, 1988, a copy of which is attached as Attachment 1 to this report. This Order of Investigation named the undersigned as investigating officer and ordered me to investigate the circumstances surrounding the inspection and replacement during the period from September 18 through 20, 1987, of the main landing gear axle spacers (hereafter referred to as sleeves) on certain Douglas DC-9-51 aircraft owned and operated by HAL. The undersigned was specifically charged with ascertaining the condition of the sleeves that were removed from the aircraft and the circumstances under which these removed sleeves were purportedly either misplaced or lost by HAL. The investigation was also to cover the issue of whether HAL or any individuals may have violated Section 43.13 or

121.153(a)(2) of the Federal Aviation Regulations or any other Federal regulation or statute.

As charged by the Order of Investigation, I conducted the investigation in accordance with the procedures set forth in Subpart F of Part 13 of the Federal Aviation Regulations. HAL was named as a party to the investigation. Throughout the investigation, HAL's counsel of record was Jonathan B. Hill, Esquire.

Pursuant to the Order, a subpoena was issued on April 18, 1988, to HAL requiring them to produce all HAL Forms 142, 46 and 1128 for Aircraft N689HA and N699HA (hereinafter referred to as aircraft 68 and 69) for the period from March 1, 1987 through September 30, 1987. All of these forms were promptly provided by HAL and were reviewed with the assistance of personnel from the FAA Honolulu Flight Standards District Office. HAL Forms 46 and 1128 are maintenance forms and were used as a basis for determining the identity of HAL maintenance personnel who were connected with the removal of inspection of the sleeves and the type of maintenance performed on the aircraft. The HAL Forms 142 are flight records which contained similar information. In addition, a subpoena was issued on to HAL requiring them to produce all HAL forms 71 (Captains Flight Report) for aircraft 68 and 69 for the period of July 1, 1987 to September 17, 1987. Attachment 2 contains data concerning the number of flights aircraft 68 and 69 were operated on during the period covered by the subpoenaed Form 71 records. In addition, I was initially supplied with certain witness statements prepared by Mr. Thomas Murata and other notes in the possession of the Honolulu Flight Standards District Office.

In conducting the investigation, I held a total of 26 depositions of various witnesses. The first 13 depositions were taken in Honolulu, Hawaii, on May 3 and 4, 1988. These depositions were taken of all HAL personnel who were identified in either HAL Forms 46 or 1128 or in Mr. Murata's witness statement as having some involvement or contact with the inspection or removal of the sleeves in question during the period from September 18-20, 1987. However, depositions were not taken of certain HAL personnel who were involved in existing related enforcement cases involving Civil Aircraft N709HA (hereinafter referred to as aircraft 70) due to my concern over prejudicing the rights of those individuals or affecting the outcome of those cases. A second group of 10 depositions were taken on August 22 through 24, 1988, in Honolulu, Hawaii. The persons deposed in this second group included three FAA employees from the Honolulu Flight Standards District Office (FSDO), additional HAL employees whose involvement was identified during the first depositions and those individuals who were not previously deposed because of their involvement in the cases concerning aircraft 70. As to the latter, I concluded that their rights could be properly protected by not permitting any questions relating to the merit or substance of the incident involving aircraft 70 and this restriction was adhered to throughout the depositions. One additional deposition was taken of a Mr. Justin Culahara, an HAL employee who was involved in the aircraft 70 accident. Mr. Culahara was out of Hawaii for compelling personal reasons at the time of the other depositions and he was deposed on his return to Honolulu on September 1, 1988, while the investigating officer was still in Hawaii on

previously scheduled personal leave. The last two depositions were taken of Albert P. Wells, a retired HAL senior Vice President residing in Florida, and John F. Daniel, a former HAL mechanic residing in Kentucky. Mr. Wells was deposed in Washington, D.C. on September 12, 1988, and Mr. Daniel was deposed in Eddyville, Kentucky on September 16, 1988. Attachment 3 contains a list of the names of the witnesses deposed in this investigation as well as the dates and places of the depositions and description of the witnesses' position with HAL or the FAA.

HAL was represented by Mr. Hill in all of the depositions except that of Mr. Culahara, for which Stephen R. Thompkins, Esquire represented the airline. In addition, with the exception of Mr. Sealy and Mr. Culahara, Mr. Hill represented all of the HAL employees as to those two depositions, Mr. Culahara was represented by John M. Cregor, Esquire and Mr. Sealy was represented by Mr. Samson Poomaihealani of the International Association of Mechanists and Aerospace Workers. At all of the depositions, the various counsels were afforded full opportunity to examine witnesses and to raise objections to questions posed by the investigating officer or other counsel. Those HAL Forms 46, 142 and 1128 and witness statements and notes which were considered relevant by either myself or other counsel were formally introduced and attached as exhibits to the individual depositions. For this reason, I consider that it would be repetitive and serve no purpose to attach the individual exhibits separately to this report. Rather, any references to these documents will consist of references to the specific exhibits contained in the depositions. For administrative purposes, the depositions are

considered to constitute Attachment 4 to this report. In addition, the various correspondence between the investigating officer and HAL are attached as Attachment 5 to this report.

Throughout the conduct of the investigation, I was required to rule on various objections at the depositions as well as on several motions or requests by HAL. In making these rulings, I based my decisions on the provisions of Part 13 of the Federal Aviation Regulations. To achieve as complete a record as is possible. I approved all of the requests for witnesses by HAL after determining that it was likely that each witness had relevant information to give. Further, as discussed earlier, existing documents in my possession were released by me to HAL by my letters of April 27, 1988 and May 25, 1988, and other inquiries for information were answered by me (see my letter of June 13, 1988). I would like to note for the record that HAL promptly complied with all subpoenas and that Mr. Hill and Mr. Howard Ogden were most cooperative in complying with all informal requests and in scheduling the testimony of the numerous HAL employees. I was assisted by Mr. Herber Aiwohi from the Honolulu FSDO who acted as my technical advisor during the depositions. Finally, by my Order dated May 23, 1988, I closed the investigation proceedings to the public on the basis that premature disclosure of the information during the pendency of the investigation could adversely affect HAL and the various witnesses especially since the record would be incomplete during an extended period of time.

III. FINDINGS OF FACT

Background

In September 1987, HAL operated five Douglas DC-9-51 aircraft which included aircraft 68, 69, and 70. The main landing gear assembly of the Douglas DC-9-51 aircraft includes the following components: the struts, the shock strut, the axle spacers (sleeves), the wheels, the brakes, the tires and the hydraulic lines. (Ogden TR at pp. 37, 38). The main landing gear spacer (sleeve) is a hollow metal cylinder which covers the axle at the location of the axle bearings. (Nitta TR at pp. 11, 12; Nishibun TR at p. 33). The bearings actually ride on the sleeves which act to protect the axle itself by keeping a frozen bearing from harming the axle. (Ogden TR at pp. 31, 32).

The Douglas aircraft Maintenance Manual (Ogden Deposition FAA Exhibit 5) on page 206 in paragraph 4a specifies the inspection/check for the main gear axle sleeves. The manual calls for a check for nicks, gouges or galling of the sleeves. The inspection/check would be a visual inspection of the sleeve. (Nitta Tr at pp. 12, 13; Ogden TR at p. 23). The Douglas aircraft Maintenance Manual specifically sets forth in paragraph 4a(2) a damage tolerance for nicks, gouges or galling as to not exceed .005 inch maximum depth in an area exceeding 25%. (Sealy TR at p. 21; Ogden TR at pp. 28, 29, 30). If the visual inspection indicated damage which might exceed this tolerance, then a more accurate measurement with a micrometer or more sophisticated test, such as dye penetrant, would normally be accomplished. (Nitta Tr at p. 13; Ogden Tr at p. 25). The presence of scratches or gouges on a sleeve beyond tolerance could result in a bearing

freezing, causing a wheel failure where the wheel would literally come apart. (Ogden TR at p. 33).

In August 1987, the main landing gear sleeves on aircraft 70 was the subject of an FAA investigation and subsequent enforcement action. While not related to this action, the management of HAL were well aware of the FAA allegation that the main landing gear sleeve on that aircraft was not in compliance with airworthiness requirements and that the FAA had requested to inspect that sleeve. (Ogden TR at p. 22). As discussed in greater detail below, the FAA request to inspect aircraft 68 and 69 arose in connection with the processing of one of the individual enforcement cases concerning aircraft 70.

FAA Letter of September 18, 1987

On September 15, 1987, Thomas Sealy had a meeting with officials from the FAA Flight Standards District Office. The meeting was originally set up for Mr. Sealy to discuss the pending enforcement case against him.¹ (Beckner Tr at p. 23). Present at the meeting were Peter Beckner, Manager, Honolulu FSDO; Richard Teixeira, Airworthiness Unit Supervisor, Honolulu FSDO, and Thomas Murata, Aviation Safety Inspector, Honolulu FSDO. (Beckner TR at pp. 4, 23; Teixeira TR at pp. 4, 9; Murata Tr at p. 4).

During the meeting, Mr. Sealy presented three handwritten notes which he indicated were written by other

¹ Mr. Sealy was employed as an aircraft mechanic for HAL and was one of the individuals charged with violations of the Federal Aviation Regulations in connection with aircraft 70.

HAL mechanics.² These notes are identified as HAL Exhibits 1 and 2 in the Beckner and Sealy depositions. The documents indicated that a problem existed with the sleeves on the two aircraft and that specifically the number two axle sleeve on aircraft 68 was severely worn. Mr. Teixeira and Mr. Beckner reviewed the three documents to ascertain the reliability of the information which was anonymous. (Teixeira TR at p. 10). After reviewing the information, Mr. Beckner and Mr. Teixeira decided that the notes constituted a reason to suspect that there may be an airworthiness problem on these two aircraft. (Beckner TR at p. 9). Based on this, it was decided to issue a letter to HAL requesting a re-examination or reinspection under Section 609 of the Federal Aviation Act of 1958. (Beckner TR at p. 7). This letter was drafted by Mr. Beckner and Mr. Teixeira and was signed by Mr. Beckner for Mr. Donald Lowry.³ (Teixeira TR at p. 7; Beckner TR at p. 8). The "609 reexamination letter" was dated and signed on September 18, 1987 and is FAA Exhibit 2 in the

² In his deposition, Mr. Sealy denied that he gave the handwritten notes, identified in his deposition as HAL Exhibit 2, to Mr. Beckner and Mr. Teixeira at this meeting on September 15, 1987 (Sealy TR at p. 51) and could not recall if he gave HAL Exhibit 1 to the FAA (Sealy TR at p. 45). Mr. Sealy also testified that he did not discuss aircraft 68 or 69 at the meeting with the FAA officials (Sealy TR at p. 50). However, it is considered that the testimony of the three FAA witnesses is credible on this point and that the three documents were given by Mr. Sealy on that date.

³ Mr. Lowry was the FAA principal maintenance inspector for HAL. During the period September 17-18, 1987, Mr. Lowry was not on the island and did not participate (Beckner TR at p. 8; Teixeira TR at p. 8). Mr. Lowry has since passed away.

Beckner and Teixeira Depositions. The letter indicated that investigation gave reason to believe that the airworthiness of aircraft 68 and 69 was in question and that it was necessary for HAL to make those two aircraft available for reinspection in the presence of two inspectors from the Honolulu FSDO. The letter further requested that the reinspection be conducted on Monday, September 21, 1987, and that HAL should contact the FSDO to confirm the date and establish a convenient time. The letter was hand-carried to HAL on the afternoon of September 18, 1987, which was a Friday. (Beckner TR at p. 10).

HAL's Decision To Inspect And Remove the Sleeves During September 18 - 20, 1987

The "609 reexamination letter" was received by Mr. Paul Finazzo, who was the President and Chief Executive Officer of HAL, at approximately 3 p.m. on September 18, 1987. (Finazzo TR at pp. 4, 8). Mr. Finazzo called Mr. Albert Wells who was HAL's Senior Vice President for Operation and read the letter to him. (Finazzo TR at p. 9; Wells TR at pp. 10,13). Mr. Finazzo gave Mr. Wells an order to take immediate action to ensure that the aircraft were safe. (Finazzo TR at p. 10; Wells TR at p. 14)⁴. Mr. Finazzo testified that he ordered the action to be taken immediately because he was very uneasy about allowing potentially unsafe aircraft to operate over the weekend

⁴ Mr. Finazzo did not give Mr. Wells any specific instructions as to what was to be done. Rather, he told Mr. Wells to take whatever action was necessary to make the aircraft airworthy (Wells TR at p. 15; Finazzo TR at p. 12).

and was concerned about the FAA trying to entrap HAL. (Finazzo TR at pp. 9,10).

After talking to Mr. Finazzo, Mr. Wells telephoned Mr. Howard Ogden, the Vice-President of Maintenance and Engineering for HAL, who was in California at the time. (Wells TR at p. 19; Ogden TR at pp. 4,6). Mr. Wells read the "609 reexamination letter" to Mr. Ogden and they discussed the contents of the letter. (Ogden TR at pp. 7, 8). Both Mr. Ogden and Mr. Wells concluded that the FAA was interested in inspecting the axle sleeves although that was not specifically mentioned in the letter. (Wells TR at pp. 18, 19). They also discussed the scheduling of the inspection of the sleeves to begin that night, particularly in view of Mr. Finazzo's order to Mr. Wells. (Wells TR at p. 19; Ogden TR at p. 8). Both witnesses indicated their concern over the delivery of the FAA letter on Friday afternoon with the inspection not to be accomplished until Monday. (Wells TR at p. 19; Ogden TR at pp. 7, 8). Mr. Ogden concurred in Mr. Wells' decision to replace all of the sleeves on aircraft 68 and 69 as quickly as possible regardless of the conditions of the sleeves. (Wells TR at pp. 19, 20; Ogden TR at pp. 9, 10). There was no discussion during their conversation of contacting the FAA to advise them of the new schedule for removal of the sleeves. (Ogden TR at p. 11). Mr. Wells testified that he believed he attempted to call the FAA that afternoon but was unable to reach any one. (Wells TR at pp. 19, 27, 28)⁵. Other than this possible one call by Mr. Wells, HAL

⁵ Mr. Wells testified that he believed that he called the FAA. He indicated he was not positive but pretty sure he did because that would have been his immediate reaction. He did concede

management personnel made no attempt to advise the FAA that the sleeves were being removed commencing Friday evening.

Mr. Wells then contacted Mr. Bonardel, the Director of Quality Assurance for HAL, and instructed him to issue a Fleet Campaign ordering that the work on the sleeves be commenced. (Wells TR at p. 29). Mr. Wells testified that he instructed Quality Assurance to issue the Fleet Campaign to replace all sleeves on aircraft 68 and 69 (Wells TR at p. 29) regardless of whether they showed wear or not, and this is reflected in HAL's letter to the FAA dated September 22, 1987. (Beckner Deposition HAL Exhibit 3; Wells Deposition FAA Exhibit 3). Quality Assurance thereafter issued HAL Forms 1128 for aircraft 68 and 69. (Honma Deposition FAA Exhibits 2 and 3; Wells Deposition FAA Exhibits 4 and 5)⁶. The HAL-1128 Forms are standard HAL forms which are used to schedule and assign certain work tasks and to indicate the work that was performed and identify the HAL employees performing the work. (Katano TR at pp. 18, 19; Kagawa TR at pp. 15, 16; Mihara TR at p. 15). HAL-1128 Forms were issued for both aircraft 68 and 69 and for each axle the form instructed the employee to remove the main landing gear wheel and tire assembly, inspect the axle sleeves and replace if necessary. Thus, there is a marked discrepancy between Mr. Wells' testimony as to

that it was possible he did not call because of the lateness of the hour (Wells TR at pp. 27, 28).

⁶ A Fleet Campaign is a maintenance work project in which specific maintenance is performed on all the carriers' aircraft or on all of a specific type of aircraft.

the instructions he gave to Quality Assurance (replace all the sleeves on aircraft 68 and 69) and the instructions contained on the HAL-1128 Forms (replace the sleeves if necessary). While conceding that the HAL-1128 Forms don't require the removal of all the sleeves, Mr. Wells testified that it was his belief that the HAL employees knew that he wanted all the sleeves replaced. (Wells TR at p. 32). However, a review of the testimony of the various employees who worked on the two aircraft indicates that there was no general understanding that all the sleeves on the two aircraft were to be removed regardless of their condition⁷.

Inspection And Removal of The Sleeves

The work on the sleeves commenced on the evening of September 18, 1987. It appears that the work was initially assigned to the work crew of Mr. Gary Nitta. This work crew consisted of the following: Gary Nitta - line maintenance manager; Alton Nishibun - lead mechanic;

⁷ Mr. Gary Nitta testified that it was his understanding that his crew was to inspect the sleeves and "replace any that were questionable" (Nitta TR at p. 16). Mr. Alton Nishibun, Mr. David Sonstein and Mr. John Daniel all understood that they were to remove the wheel and inspect the sleeve and if there was any damage to get a HAL inspector who would determine if the sleeve was acceptable. If the sleeve was determined not acceptable, then it was to be removed (Nishibun TR at p. 16; Sonstein TR at p. 12; Daniel TR at pp. 20, 24). Mr. Tracy Katano and Mr. Oliver Pohina (HAL inspectors) testified that they understood that they were to inspect the sleeves and replace them if there was any damage (Katano TR at p. 18; Pohina TR at p. 27). Mr. Douglas Kam testified that his understanding of the phrase "if necessary" in the HAL-1128 Form was to replace the sleeve if it was out of tolerance (Kam TR at pp. 16, 17).

John Daniel, David Sonstein, Thomas Sealy, Eric Nishijima and Garrick Shimabukuro - line maintenance mechanics. (Nitta TR at p. 10; Nishibun TR at pp. 11, 13, 6; Sonstein TR at pp. 7, 8, 9, 10; Nishijima TR at pp. 8, 9; Sealy TR at pp. 11, 13, 14; Daniel TR at pp. 10, 13, 14; Shimabukuro TR at p. 10). It appears that they began the work by first pulling the wheels and then visually looking at the sleeves. (Daniel TR at pp. 39, 40; Nishibun TR at p. 20). Damage was noted to at least three of the four sleeves on aircraft 68. (Nishibun TR at p. 21; Daniel TR at p. 45; Sealy TR at p. 43; Nishibun Deposition FAA Exhibit 2). After the removal and inspection by Mr. Nitta's crew, the sleeves were inspected by a HAL inspector. (Sealy TR at p. 17; Sonstein TR at p. 11; Daniel TR at p. 21; Katano TR at p. 26). The records as reinforced by the testimony indicate that both aircraft 68 and 69 were worked on the first night. (Nishibun FAA Exhibit 2 and 3; Nishibun TR at pp. 19, 29, 30). The records and the testimony indicate that the work was not completed the first night but rather continued over the whole weekend. (Nishibun TR at pp. 68, 69; Daniel TR at pp. 36, 59; Sealy TR at p. 35; Nishijima TR at p. 20).

During its shift, Mr. Nitta's crew commenced removal of at least two sleeves on aircraft 69 and two sleeves on aircraft 68. (Nishibun FAA Exhibit 2 and 3). The work was apparently accomplished primarily by Mr. Daniel and Mr. Sealy with Mr. Sonstein and Mr. Nishijima and Mr. Shimabukuro also participating in the removal of some of the sleeves. (Daniel TR at p. 54; Sealy TR at pp. 26, 27; Nishijima TR at p. 10; Shimabukuro TR at p. 11; Sonstein TR at pp. 12, 13). The removal of the sleeves is a difficult and time consuming process. The tire, brakes,

bearings and anti skid transducer are removed. The inside of the axle is then packed with dry ice to shrink it and the sleeve is heated with a torch to expand it. After a period of time to permit this shrinkage and expansion, the sleeve is removed by a puller. (Nishibun TR at pp. 51, 52). The whole process of removing the sleeve takes about 2 to 3 hours. (Murata TR at p. 12).

Mr. Nitta was relieved by Mr. Justin Calahara at 2 a.m. on Saturday morning, although it appears that certain of Mr. Nitta's crew continued working on the sleeves on aircraft 68 and 69. (Culahara TR at p. 11). Mr. Culahara was also a line maintenance manager. (Culahara TR at p. 10). Mr. Raymond Yoshioka was his lead mechanic. (Ugale TR at p. 10; Yoshioka TR at pp. 7, 10). Mr. Fred Ugale was one of the line maintenance mechanics. (Ugale TR at p. 10). My investigation was unable to ascertain the identity of the other members of Mr. Culahara's crew during the period of September 18 - 20, 1987. The makeup of the crews change and no records listing the crew members were available. Further, neither Mr. Culahara nor Mr. Yoshioka were able to recall what mechanics were working in their crew at that time. (Culahara TR at p. 13; Yoshioka TR at p. 10). Similarly, none of the HAL Forms 1128 or 46 were signed off by anyone identified as a member of Mr. Culahara's crew. It does appear, however, that Mr. Culahara's crew did participate in the removal of some of the sleeves on aircraft 68 and 69⁸. As indicated above, Mr. Nitta's crew worked

⁸ Mr. Culahara testified that Mr. Yoshioka was working on the sleeves on at least one of the aircraft in question (Culahara TR at pp. 20, 21). As will be discussed later in greater detail, Mr.

on the sleeves again which they returned to work on Saturday night and the evidence indicates that they did the bulk of the work on the sleeves.

Mr. Culahara's crew as replaced by the crew of Mr. Oliver Pohina who was also a line maintenance manager. Mr. Pohina testified that his crew did not have any involvement with the sleeves on aircraft 68 or 69 on either Friday or Saturday. (Pohina TR at p. 14). His crew did work on one of the DC-9-50 aircraft concerning the sleeves on Sunday. (Pohina TR at pp. 14, 15). The records indicate that all of the sleeves were replaced on aircraft 68 and 69 during the weekend of September 18 - 20, 1987. The records also indicate that the replacement of the last of the sleeves (sleeves on axles 3 and 4 on aircraft 69) was not completed and signed off until September 20, 1987. (Kagawa Deposition FAA Exhibit 2). In fact, Mr. James Kagawa, the HAL lead inspector, testified that these two sleeves were not signed off as completed until shortly before 10:30 p.m. on September 20, 1987. (Kagawa TR at pp. 34, 35, 36).

Ugale testified that his involvement was limited to cleaning two sleeves and that he had no other duties regarding the DC-9-50 axle sleeves (Ugale TR at p. 25). Mr. Yoshioka denied seeing any of the sleeves and the most notable feature of his testimony was his repeated lack of recollection of the incident (Yoshioka TR at pp. 12, 15, 16).

The records⁹ and testimony indicate that the below listed HAL employees performed inspections on the following sleeves on aircraft 68 and 69:

Mr. Nishibun indicated that he inspected the Number 1, 2 and 3 sleeves on aircraft 68 and the #1 and 2 sleeves on aircraft 69. (Nishibun FAA Exhibits 2 and 3; Nishibun TR at pp. 19, 29, 30).

Mr. Kagawa indicated that he inspected the #1 sleeves on aircraft 68 and the #3 and 4 sleeves on aircraft 69. (Kagawa Deposition FAA Exhibits 2, 3, 4; Kagawa TR at pp. 23, 28, 30, 31, 32).

Mr. Tracy Katano, a HAL inspector, indicated that he inspected the #2 and 4 sleeves on aircraft 68. (Katano Deposition FAA Exhibits 3 and 4; Katano TR at pp. 24, 25)

Mr. Henry Ikezawa, a HAL inspector, indicated that he inspected the #1 and 2 sleeves on aircraft 69. (Ikezawa Deposition FAA Exhibit 3; Ikezawa TR at pp. 16, 17, 18).

Mr. Douglas Kam entered his employee number as having inspected the #4 sleeve on aircraft 69. (Kam FAA Exhibits 2 and 3).

Request For The Sleeves By Mr. Murata

During the evening of September 18, 1987, Mr. Murata received a telephone call concerning the sleeves on aircraft 68 and 69. Mr. Murata testified that the caller

⁹ This information is indicated on the records by the employee placing his employee number in the blocks for the work assignments on the HAL Form 1128 or HAL Form 46. In some instances, initials or the last name are used.

told him that a sleeve was going to be removed from one of the HAL DC-9 aircraft. (Murata TR at p. 9). Mr. Murata further testified that the caller was Mr. Sealy. (Murata TR at p. 43). Mr. Murata then proceeded to the HAL maintenance facilities arriving at approximately 10 p.m. on Friday night. (Murata TR at p. 9). He introduced himself to Mr. Nitta, Mr. Nishibun, and Mr. Ikezawa and indicated he desired to go to the work area where work was going on with the DC-9 aircraft. (Murata TR at pp. 9, 10). Mr. Murata then proceeded to aircraft 69 where Mr. Sealy and Mr. Daniel were working. (Murata TR at p. 11). Mr. Murata looked at the right inboard and right outboard sleeves on aircraft 69. (Murata TR at p. 12; Murata Deposition FAA Exhibit 4). At the time of this inspection, the sleeves were still on the aircraft. (Murata TR at p. 12; Daniel TR at p. 48). Mr. Murata testified that the inboard sleeve was badly sanded with a cut about 1/16 inch deep and two inches long. The outboard sleeve was badly galled. (Murata TR at p. 13). Both Mr. Sealy and Mr. Daniel agreed that the sleeves looked at by Mr. Murata were damaged. (Sealy TR at p. 24; Daniel TR at p. 50). In fact, the testimony of all three individuals present at Mr. Murata's inspection of aircraft 69 agreed that the damage to the two sleeves was beyond tolerance. (Murata TR at pp. 50, 51; Daniel TR at p. 75; Sealy TR at p. 20).

Mr. Murata then went to Mr. Nitta and requested the two sleeves which he had looked at. (Murata TR at p. 14; Nitta TR at p. 28). Mr. Murata identified the sleeves he wanted. (Nitta TR at p. 28). Because it would take so long to remove the sleeves, Mr. Murata told Mr. Nitta that he would return early on Saturday morning for the sleeves. (Nitta TR at p. 31). He also requested Mr. Nitta to tell Mr.

Culahara (who was the next line manager coming on duty) to have the sleeves ready so he could conduct a further inspection of the sleeves. (Murata TR at p. 15; Nitta TR at p. 31). Mr. Nitta agreed to do so.

After talking with Mr. Murata, Mr. Nitta called Mr. Joe Honma, HAL Director of Base Maintenance, for guidance as to whether the sleeves should be given to the FAA. (Honma TR at p. 22; Nitta TR at p. 26). Mr. Honma in turn called Mr. Wells for guidance. Mr. Wells told Mr. Honma that they should not give the sleeves to the FAA until after HAL had a chance to look at them. (Honma TR at pp. 22, 23)¹⁰. Mr. Honma then called Mr. Nitta back and told him that the "big bosses" wanted to see the sleeve before it was handed over to the FAA. (Nitta TR at p. 27). Mr. Nitta then relayed this information to Mr. Culahara when he came on duty. (Nitta TR at p. 31). He also told Mr. Culahara that Mr. Murata would be coming back for the sleeves Saturday morning. (Nitta TR at p. 31). During their telephone conversation, Mr. Wells did not give Mr. Honma any instructions as to what was to be done with the sleeves (Wells TR at p. 38) and Mr. Honma gave no such instructions to Mr. Nitta (Honma TR at p. 24). Similarly, Mr. Nitta gave no instructions to Mr. Culahara as to what was to be done with the sleeves after they were removed (Nitta TR at p. 31) and Mr. Culahara neither attempted to identify the sleeves requested by Mr. Murata or to give any instructions to the mechanics as to

¹⁰ Mr. Wells testified that he did not want to give the requested sleeves to the FAA until they had gotten a proper receipt and had the sleeves inspected. He indicated that he wanted to keep control (Wells TR at p. 37).

what should be done with the sleeves (Culahara TR at pp. 17, 18, 22, 23).

Mr. Murata returned to the HAL facility on Saturday morning at 8 a.m. to obtain the two sleeves he requested. He talked to a number of people but was unable to find the sleeves or to determine where they were located¹¹. When Mr. Murata was unable to locate the sleeves, he went to Mr. Culahara and requested the sleeves from him. Mr. Culahara told him that he could not release the sleeves because Mr. Wells in a telephone conversation had told him not to release the sleeves. (Murata TR pp. 22, 23; Culahara TR at p. 42)¹². After this conversation with Mr. Culahara, Mr. Murata attempted to call Mr. Wells on Saturday but was not able to reach him. (Culahara TR at p. 3; Murata TR at pp. 22, 23). Mr. Culahara then suggested to Mr. Murata that he would attempt to talk to Mr. Wells and that Mr. Murata should stop by on Sunday morning. (Murata TR at p. 23; Murata Deposition FAA Exhibit 4). Mr. Murata returned again on Sunday and was told by Mr. Culahara that Mr. Wells would not release the sleeves to him. (Culahara TR at p. 43; Murata TR at p. 25; Murata FAA Exhibit 4). Mr.

¹¹ On Saturday morning, Mr. Murata talked to Mr. Edwin Tatami (HAL Manager of Aircraft Overhaul), Mr. Fred Ugale, Mr. Reza LaSane (HAL Overseas Maintenance Manager) and Mr. Culahara (Murata TR at pp. 18, 19; Tatami TR at pp. 12; LaSane TR at pp. 8, 12, 13; Ugale TR at pp. 23, 23; Culahara TR at pp. 40, 41).

¹² Mr. Culahara testified that when he called Mr. Wells on Saturday, he was told not to release the sleeves because Mr. Wells wanted to speak with the HAL attorney (Culahara TR at p. 42).

Murata then talked to Mr. Wells by telephone and was told that Mr. Wells would not release the sleeves until he talked to the HAL lawyer. (Wells TR at pp. 45, 46; Murata FAA Exhibit 4)¹³. Mr. Murata then terminated his effort to obtain the two sleeves. Mr. Murata prepared notes concerning his efforts to obtain the two sleeves. These notes were prepared on the same day and were admitted as FAA Exhibit 3 in his deposition. (Murata TR at p. 34).

During the weekend, there were two sleeves that apparently came off one of HAL DC-9-50 aircraft which were retained. Mr. Ugale testified that he found two sleeves on a tool box on Saturday. He took them to Mr. Culahara who told him to clean the sleeves¹⁴. Mr. Ugale did not know which aircraft the two sleeves came from and there were no tags on the sleeves to identify them. (Ugale TR at pp. 11, 12, 15). Mr. Culahara told Mr. Ugale to take the sleeves to the engine shop to clean them. (Ugale TR at pp. 11, 15). Mr. Ugale met Mr. Murata after he had left the two sleeves in the engine shop. (Ugale TR at p. 23). Mr. Murata asked him where the sleeves were and he told Mr. Murata they were soaking in the tank. (Ugale TR at p. 24). Mr. Ugale went back later and could not find the sleeves. He went back a third time and found the sleeves on a cart. (Ugale TR at pp. 18, 19, 20). He then

¹³ Mr. Culahara testified that he thought that Mr. Murata was unsuccessful in contacting Mr. Wells. However, both Mr. Murata and Mr. Wells testified that a telephone conversation between them did occur on Sunday.

¹⁴ The evidence indicates that there is frequently grease on the sleeves when they are taken off (Murata TR at p. 34).

left them in Mr. Culahara's office¹⁵. Mr. Murata did call Mr. Beckner on Sunday to brief him as to what happened. (Murata TR at p. 47; Beckner TR pp. 11, 38).

As will be discussed further, these two sleeves were subsequently turned over to the FAA. Mr. Murata testified that he did inspect these two sleeves that were produced by HAL and that they were not the two sleeves that he inspected Friday night on aircraft 69. He specifically testified that the sleeves produced by HAL did not have any gouges, scratches, or marks such as he had observed on the sleeves on aircraft 69 on Friday night. Because of this clean condition, Mr. Murata concluded that they were different sleeves. (Murata TR at pp. 27, 28). I also had an opportunity to inspect the sleeves and did not note any of the markings described by Mr. Murata and Mr. Daniel. For these reasons, it is considered that the two sleeves produced by HAL were not the sleeves inspected and requested by Mr. Murata¹⁶.

Events Following HAL Replacement of the Sleeves

On Monday, September 21, 1987, Mr. Murata briefed Mr. Beckner and Mr. Teixeira on the events of that weekend. Based on this briefing, Mr. Beckner drafted and sent a second letter to HAL. This letter is designated as Beckner FAA Exhibit 2 and Teixeira FAA Exhibit 3. The letter

¹⁵ Mr. Ugale believed these were the same two sleeves because when he found them they were still wet on the bottom as if they had been in the cleaning tank (Ugale TR at p. 26).

¹⁶ Mr. Murata specifically testified that the presented sleeves looked good. (Murata TR at p. 28).

was jointly drafted by Mr. Beckner and Mr. Teixeira. (Teixeira TR at p. 16; Beckner TR at pp. 12, 13). The purpose of the letter was to advise HAL that the FAA had become aware of the fact that the requested inspections had been completed over the weekend despite the FAA request that the inspections be accomplished in the presence of two FAA inspectors. The letter also clarified the intent of the September 18, 1987 letter by specifically indicating that the inspection was to include the sleeves. The letter also emphasized that the FAA intended to inspect the aircraft and that all the removed sleeves should be given to the FAA for an airworthiness inspection. (Teixeira TR at p. 16; Teixeira FAA Exhibit 3). In response to this second letter, HAL arranged for a meeting on September 23, 1987 at the Honolulu FSDO. Present at the meeting were Mr. Finazzo, Mr. Wells, and Mr. Ogden from HAL and Mr. Beckner, Mr. Teixeira and Mr. Murata for the FAA. (Teixeira TR at pp. 18, 19; Beckner TR at pp. 14, 16). At the meeting, HAL presented the two sleeves that were cleaned by Mr. Ugale and advised the FAA that they could not locate any of the other sleeves. (Beckner TR at p. 14; Teixeira TR at p. 18; Wells TR at p. 52). These two sleeves were secured in a locked safe¹⁷.

HAL also presented a letter dated September 22, 1987, which was drafted and signed by Mr. Wells. (Ogden TR at p. 21; Teixeira Deposition FAA Exhibit 4; Beckner Deposition FAA Exhibit 3). This letter stated HAL's position concerning the inspection of the aircraft and sleeves.

¹⁷ The sleeves were subsequently inspected by Mr. Murata and later by myself. I also authorized HAL personnel to inspect those sleeves at the Honolulu FSDO.

It indicated that Mr. Finazzo ordered the inspection to be commenced immediately to ensure the airworthiness of the aircraft. The letter also indicates that HAL was not willing to delay the inspection for the three day period after receipt of the September 18, 1987 letter. It also states that Mr. Murata did request on September 20, 1987 that all removed sleeves be retained and advised the FAA that HAL was presenting two of the removed sleeves but was unable to locate any other of the removed sleeves. The letter further summarized HAL's position that the problem should have been addressed immediately and not three days later as provided in the FAA letter of September 18, 1987. Finally, HAL offered to have the aircraft reinspected on the evening of September 23, 1987. The FAA did not reinspect the aircraft as offered by HAL because it was clear that the sleeves had already been removed and that was the portion of the aircraft for which the FAA considered that needed to be reinspected. (Teixeira TR at p. 42).

IV. ANALYSIS OF SPECIFIC ISSUES RAISED IN THE ORDER OF INVESTIGATION

A. Compliance With Section 609(a) of the Federal Aviation Act of 1958

Section 609(a) of the Federal Aviation Act of 1958, as amended provides in part:

"The Administrator may, from time to time, reinspect any civil aircraft, aircraft, engine, propeller, appliance, air navigation facility, or air agency, or may re-examine any civil air [49 U.S.C. 1429(a)] (emphasis added)."

This section has been interpreted as authorizing the Administrator to re-examine any civil airman at any time and to require the airman to submit to this re-examination. *Dois Wesley Miller*, 13 CAB 203, 204 (1950); *Administrator v. Harper*, 1 NTSB 219, 222 (1968). While the majority of the cases involve the exercise of the authority to re-examine an airman, it is clear from both the express language of the statute as well as case law¹⁸ that the Administrator has authority to reinspect any civil aircraft. *Administrator v. Anderson Aircraft Corp.*, 3 NTSB 3252, 3255 (1981).

The reported decisions by the NTSB indicate that the Administrator's authority under this section is not unfettered or unlimited. Rather, the decisions indicate that the Administrator's authority is to reinspect the aircraft or re-examine the airman where there are reasonable grounds to question the airman's competency or the airworthiness of the aircraft. *Gerley Stephen DeFazio*, 18 CAB 931 (1954); *Administrator v. Sector*, 1 NTSB 324, 325, note 3 (1968); *Administrator v. Harrington*, 1 NTSB 1042, 1043-1044, (1971); *Administrator v. Terwilliger*, 1 NTSB 1096, 1097 (1971). This requirement has been defined as requiring that the Administrator only be able to demonstrate a reasonable basis for believing that pilot competency (or aircraft airworthiness) is in question. *Administrator v. Ringer*, 3 NTSB 3948, 3949 (1981); *Administrator v. O'Day*, NTSB Order EA-1953 at page 4 (1983). It

¹⁸ My research has not revealed any Federal court decisions relating to Section 609. As indicated above, there are numerous NTSB decisions which are considered to constitute precedent in this area.

has also been required that the scope of the re-examination be reasonably related to the qualifications under question and not be unduly broad. *Administrator v. Hinman*, 2 NTSB 2496 (1976).

While Section 609(a) of the Federal Aviation Act of 1958 was not specifically referred to in the Order of Inspection, I was charged with determining whether HAL or any of its employees violated any other Federal regulation or statute. In my opinion, this charge includes any possible failure by HAL to comply with the requirements of Section 609. Therefore, this portion of the report will deal with the issues of whether a request was made by the FAA under Section 609; whether there was a reasonable basis for issuing a request under that section; and whether HAL complied with any request issued under Section 609.

As to the first issue, it is clear from the investigation that a request was made by the FAA to HAL to make aircraft 68 and 69 available for reinspection in the presence of two FAA inspectors. This request was contained in the FAA letter of September 18, 1987, and was specifically made pursuant to and under the authority provided by Section 609(a) of the Federal Aviation Act of 1958. (Teixeira FAA Exhibit 2 at lines 4 and 5). Both Mr. Teixeira and Mr. Beckner testified that they had made the request under Section 609(a) of the Federal Aviation Act of 1958. (Beckner TR at p. 7; Teixeira TR at p. 10). Accordingly, it is concluded that the September 18, 1987 letter constituted a request for reinspection of aircraft 68 and 69 pursuant to Section 609(a) of the Federal Aviation Act of 1958.

As to the second issue of whether there was a reasonable basis for a Section 609(a) reinspection of aircraft 68 and 69, both Mr. Beckner and Mr. Teixeira testified that they relied on the handwritten notes which were provided by Mr. Sealy. Mr. Beckner testified that his review of the notes led him to conclude that there may be an airworthiness problem with the two aircraft. (Beckner TR at pp. 8, 9). He specifically characterized the notes as constituting a reason to suspect that there may be a problem with the sleeves and that, when coupled with the existing case involving the sleeve on aircraft 70, he considered the information in the notes sufficient to warrant the FAA to have a look at the sleeves. (Beckner TR at p. 30). Mr. Teixeira testified that there was not strong enough evidence to ground the aircraft under Section 605 of the Federal Aviation Act of 1958, as amended (Teixeira TR at p. 30).

It is my conclusion that the information contained in the notes provided to the FAA did constitute a reasonable basis for the FAA to request a reinspection of the sleeves on aircraft 68 and 69. While it is true that the notes were anonymous (at least at the time they were presented), the information was specific and was purportedly given by HAL mechanics who had personal firsthand knowledge of the aircraft. (Teixeira TR at p. 25; Beckner TR at pp. 22, 23, 24, 25). Under the above cited NTSB decisions, the test is not whether the FAA has evidence establishing that the aircraft were not airworthy. Rather, the test is whether the FAA has information which gives reason to believe that the aircraft *may not* be airworthy (emphasis added). It is my opinion that the information contained in the notes clearly meets this requirement.

As to the remaining issue, the evidence indicates that HAL did not comply with the FAA's request made under Section 609(a) of the Act – the FAA requested that the main landing gear sleeves of aircraft 68 and 69 be reinspected in the presence of two FAA inspectors on September 21, 1987 and this was not accomplished in that HAL did not provide the aircraft for the requested reinspection on the designated date, and in fact modified the main landing gear assemblies by replacing the sleeves prior to that date. However, this does not answer the question of whether HAL violated Section 609(a). In its brief, HAL submits that it conducted an immediate removal of the sleeves because it considered a delay of the inspection for three days to be not acceptable from a safety standpoint. HAL further contends that, due to the strained relationship between it and the FAA, it could not rule out the possibility that it was being set up for enforcement action if it allowed the aircraft to fly an additional 45 flights that weekend. (HAL Brief at p. 6). HAL further submits that the FAA's actions in delaying its notification from Tuesday until Friday and then delivering the letter late Friday afternoon contributed to this misunderstanding and led to the sleeves being removed without being inspected by the FAA. (HAL Brief at pp. 23, 24).

The points raised by HAL are considered to constitute a reasonable basis for HAL to immediately schedule the inspection/removal of the sleeves rather than wait until September 21, 1987, as requested in the September

18, 1987 letter¹⁹. In other words, it cannot be said that the actions by HAL to correct a possible airworthiness problem at an earlier date were unreasonable. In this connection, it is noted that the FAA witnesses indicated that, if advised, the Agency would have modified the schedule so as to conduct the inspection on the earlier date²⁰. Similarly, the timing of the delivery of the 609 letter on Friday afternoon is considered to be an extenuating factor in this case. However, for the reasons set forth below, it is my opinion that the points presented by HAL in its defense do not excuse the failure of HAL to either to notify the FAA of the changed schedule or to take action to preserve the sleeves until they could be jointly inspected by HAL and the FAA.

The evidence indicates that on September 18, 1989, HAL management understood the FAA's "609" letter to include a reinspection of the sleeves. In their initial conversation, Mr. Wells advised Mr. Finazzo that the sleeves were involved in the FAA request and might have to be replaced along with other items. (Finazzo TR at pp. 30, 31). Mr. Wells testified that after being read the letter, he told Mr. Finazzo that he "assumed that the FAA was

¹⁹ In fact, Mr. Teixeira conceded in his testimony that it was reasonable for a carrier to schedule an inspection earlier than had been requested by the FAA. (Teixeira TR at p. 40).

²⁰ Mr. Beckner testified that if HAL had called him and said that it could do the inspection on Friday night, he would have sent the two inspectors over at that time. (Beckner TR at p. 32). Such an accelerated inspection had been accomplished in connection with aircraft 70 where the FAA had requested to look at the sleeve next time HAL had the wheel off and HAL inspected it earlier and notified the FAA. (Ogden TR at pp. 22, 23).

primarily referring to the axle sleeves which were part of the main landing gear, * * * ." (Wells TR at p. 14, lines 19-21)²¹. Further, during their conversation on September 18, 1987, Mr. Wells and Mr. Ogden concluded that the FAA requested inspection was limited to the sleeves. (Ogden TR at p. 47). Mr. Honma testified that on Friday afternoon he was told by Mr. Wells that the FAA was going to inspect the sleeves on Aircraft 68 and 69 and "We want to look at it this weekend". (Honma TR at P. 32, lines 22, 23) Thus, before any action was taken on September 18, 1987, HAL management personnel were aware that the concern of the FAA in requesting the reinspection was directed solely to the sleeves on aircraft 68 and 69²².

The sleeves in question are considered expendable items and are not considered to be repairable. The normal HAL practice was to discard the sleeves after they were removed from the aircraft. (Wells TR at p. 40; Ogden TR at pp. 13, 39). Because of this, the sleeves were also not considered a controllable item and did not contain any serial number or identifying marking. (Wells TR at p. 40; Ogden TR at p. 39). Thus, under ordinary practice, once a sleeve was removed, there would be no way to determine which aircraft it had been removed from and the sleeve would be thrown away. With the sleeves being inspected and removed Friday night, it is clear that, unless HAL

²¹ Mr. Wells testified that he arrived at this conclusion due to another case involving the axle sleeve on aircraft 70 and assumed that the instant case was a carry on from that matter. (Wells TR at p. 15).

²² Mr. Ogden testified that it was both his and Mr. Wells' impression that the FAA were not interested in the rest of the aircraft. (Ogden TR at p. 47).

either notified the FAA so the latter could inspect the sleeves when they were removed, or tagged the sleeves so they could be identified and inspected later on, there would be no way that the FAA would have been able to inspect the sleeve on Monday as they had requested. This fact was also known or should have been known by HAL management prior to any action being taken²³.

Despite this, HAL took no effort (other than one possible call by Mr. Wells) to notify the FAA of the advanced schedule. Mr. Finazzo testified that he did not attempt to advise the FAA himself as he assumed that Mr. Wells would tell the FAA or order someone to do so. (Finazzo TR at p. 23)²⁴. As mentioned previously, Mr. Wells may have attempted to call the FAA but was unsuccessful if such an attempt was made. (Wells TR at pp. 27, 28)²⁵. There was no discussion in the telephone conversation between Mr. Wells and Mr. Ogden about notifying the FAA. (Ogden TR at p. 16). The bottom line was that no

²³ Mr. Wells conceded that if the normal procedure was followed, the sleeve would be destroyed. However, he contended that he did not focus on someone discarding the sleeves that quickly. He did concede that there would be no way to tell which sleeve had been taken off which aircraft. (Wells TR at pp. 40, 41). Mr. Ogden candidly conceded if normal procedures were followed the sleeves would not be available for anyone to inspect. (Ogden TR at p. 13).

²⁴ Mr. Finazzo also testified that he was under the impression that the FAA would be present on at least have the opportunity to be present. (Finazzo TR at p. 24).

²⁵ Even this call (if made) was not expressly for the purpose of notifying the FAA of the changed schedule. Mr. Wells testified that he was not calling the FAA to notify them of the inspection but to find out what was going on. (Wells TR at p. 17).

one in HAL management notified the FAA or even attempted to notify them of the changed schedule. As a result, the FAA never learned of the inspection until it was informally notified by Mr. Sealy after the inspection had already started. Based on all the circumstances, I do not consider that HAL took reasonable efforts to notify the FAA of its intention to immediately inspect and remove the sleeves²⁶.

Furthermore, on September 18, 1987, HAL also took no action whatsoever to tag and preserve the sleeves for later inspection. During his conversation with Mr. Wells, Mr. Finazzo did not give any instructions concerning the retention or destruction of the sleeves, leaving it to Mr. Wells to do whatever is necessary. (Finazzo TR at pp. 13, 14, 29, 32)²⁷. Mr. Wells did not discuss with Mr. Ogden during their telephone conversation what should be done with the sleeves after their removal. (Ogden TR at p. 13). Furthermore, Mr. Wells did not tell Quality Assurance what to do with the sleeves after their removal and there was no instructions contained in the HAL Forms 1128 for aircraft 68 and 69. (Wells TR at pp. 26, 27; Wells Deposition FAA Exhibits 4 and 5). Thus, the bottom line again is that HAL took no steps to tag or otherwise identify the

²⁶ Mr. Beckner testified that he was always on call and that there was a standby duty available 24 hours a day. (Beckner TR at pp. 32, 33). Mr. Sealy was able to contact Mr. Murata on Friday evening. Mr. Murata also testified that his home phone number was kept at the HAL maintenance office. (Murata TR at p. 43). It is concluded that HAL could have advised the FAA if it made a reasonable attempt to do so.

²⁷ This is considered understandable in view of Mr. Finazzo's position with HAL.

removal sleeves or to return them for further inspection. Mr. Wells testified that he had no objection to the FAA inspecting the sleeves but that his instruction from Mr. Finazzo were to change all the sleeves immediately. (Wells TR at pp. 16, 21). While, Mr. Wells may not have intentionally attempted to prevent the FAA inspecting the sleeves, the end result of his actions were that the inspection could not be accomplished because no steps were taken to preserve the sleeves for such inspection.

This failure on the part of HAL personnel to take appropriate action continued in connection with Mr. Murata's request for the two sleeves from aircraft 69²⁸. Mr. Murata did make a timely request to Mr. Nitta for the two sleeves while they were still on the aircraft. (Murata TR at pp. 14, 15; Nitta TR at pp. 18, 19, 24). Mr. Nitta promptly called Mr. Honma informing him of the request and asking for instructions as to what he should do. (Nitta TR at p. 26; Honma TR at p. 22). Mr. Honma then called Mr. Wells advising him of the inquiry. (Honma TR at p. 22). As indicated in the preceding part, Mr. Wells instructed Mr. Honma not to give the sleeves to the FAA and this was relayed to Mr. Nitta. Despite this specific request, Mr. Wells did not give Mr. Honma any instructions as to what was to be done with the two sleeves. (Wells TR at p. 38)²⁹. Mr. Honma did not give any instructions to Mr. Nitta concerning what was to be done with

²⁸ Mr. Murata's request is considered to be in furtherance of the FAA's "609(a)" request of September 18, 1987.

²⁹ Mr. Wells testified that he was aware that the normal practice was to throw away the sleeves but he did not think it would be done before Monday. (Wells TR at p. 38).

the two sleeves. (Honma TR at p. 23)³⁰. Mr. Nitta in turn did not give any instructions to Mr. Culahara to tag the sleeve. (Nitta TR at p. 34). Mr. Nitta did tell Mr. Culahara that the FAA had requested some of the sleeves and to hold the sleeves. (Culahara TR at p. 17). Mr. Nitta did not identify the requested sleeves to Mr. Culahara who did not know which sleeves he was referring to. Despite this, Mr. Culahara did not attempt to ascertain which aircraft the sleeves were purportedly being taken from. (Culahara TR at p. 17)³¹. Finally, the HAL mechanics who were removing the two sleeves, Mr. Sealy and Mr. Daniel, were not given any instructions as to what was to be done with sleeves. (Sealy TR at p. 24; Daniel TR at pp. 23, 24; Shimabukuro TR at p. 16; Nishijima TR at p. 17). As was discussed above, my conclusion is that the two sleeves requested by Mr. Murata were not retained by HAL and were not turned over to the FAA.

In summary, taking the evidence in the best light to HAL and accepting at face value the testimony of its personnel, it appears that HAL failed to take reasonable steps to notify the FAA so the latter could participate in the accelerated inspection and also failed to take any steps to have the removed sleeves tagged and preserved for later inspection. This not only involved HAL's failure

³⁰ Mr. Honma testified that since he told Mr. Nitta that Mr. Wells wanted to see the sleeves he assumed that Mr. Nitta would keep the two sleeves. (Honma TR at p. 24).

³¹ At the time, Mr. Nitta was relieved by Mr. Culahara, the sleeves were still on the aircraft and Mr. Daniel was still working on removing them. Apparently, on that day (September 19, 1987), Mr. Daniel and Mr. Nishibun worked longer than Mr. Nitta. (Nitta TR at pp. 29, 30).

to issue such instructions at the time the removal was ordered but also included a failure to take proper steps to retain the two sleeves requested by Mr. Murata. Even after Mr. Murata's request, there apparently were no instructions given to ensure retention of other sleeves still being removed despite the fact that the inspection and replacement of the lost sleeves was not completed until late on the evening of September 20, 1987³².

The inspection also uncovered evidence of actions on the part of certain HAL middle management personnel to intentionally take the sleeves as soon as they were removed from the aircraft. Mr. Daniel and Mr. Sealy both testified that they saw Mr. Culahara and Mr. Nitta pick up sleeves soon after they were removed from the aircraft and drive away with them utilizing a golf cart or pick up truck. (Daniel TR at p. 55; Sealy TR at pp. 27, 28). On this point, Mr. Daniel's testimony was more specific. He testified that he was told that the line managers wanted the sleeves and that the mechanics were to make sure that the managers got possession of them. (Daniel TR at pp. 56, 57). He also testified that at one point in time that weekend he bid one of the sleeves with the intention of giving it to the FAA. According to Mr. Daniel, Mr. Culahara

³² Mr. James Kagawa testified that two of the sleeves were not signed off as having been inspected until approximately 2230 on September 20, 1987. (Kagawa TR at pp. 24, 25, 28, 29, 34, 35). The majority of the HAL inspections and mechanics involved in the inspection and removal process (in addition to those already discussed) testified that they had been given no instructions as to what was to be done with the sleeves. (Omoto TR at p. 10; Sonstein TR at p. 13; Kam TR at p. 20; Pohina TR at p. 30).

threw a "raving fit" (Daniel TR at p. 71, line 8) while attempting to locate the missing sleeve. Due to concern over Mr. Culahara's actions, Mr. Daniel testified that he returned the sleeve in Mr. Culahara's absence. The sleeve was also subsequently taken by Mr. Culahara. (Daniel TR at pp. 57, 70, 71, 73)³³.

On the other hand, Mr. Nitta and Mr. Culahara³⁴ denied even seeing any of the sleeves much less taking any of them into their possession on that weekend. (Culahara TR at p. 22; Nitta TR at p. 32). The other members of Mr. Nitta's crew testified that they either did not remember what happened to the sleeves after they were removed or did not know what happened to them³⁵.

³³ Mr. Daniel also testified that he overheard some of the mechanics joking that Mr. Culahara and Mr. Nitta were going to take the sleeves to the lagoon and give them the "float test" - throw them in the lagoon to see if they could float. Mr. Daniel testified that he did not actually observe any sleeve being thrown into the lagoon. (Daniel TR at pp. 73, 74).

³⁴ Mr. Culahara, of course, did indicate that he was told of the two sleeves found by Mr. Ugale but denied ever seeing those two sleeves. (Culahara TR at pp. 40, 41).

³⁵ Mr. Sonstein testified that he took the sleeves and put them on a golf cart. He did not remember what happened to them after and did not know who carried the sleeves away. (Sonstein TR at pp. 14, 15). Mr. Nishijima testified that he did not see what happened to the sleeves after they were taken off the aircraft. He also indicated he last saw the sleeves on the ground and doesn't know what happened to them after that. (Nishijima TR at pp. 17, 18). Mr. Shimabukuro testified that he set the sleeves down after removing them. (Shimabukuro TR at p. 15). Mr. Nishibun testified that he did not recall specifically what happened to the sleeves or recall them being given to Mr. Nitta. (Nishibun TR at pp. 26, 28).

Both Mr. Sonstein and Mr. Nishibun did recall either putting or seeing the sleeves on a golf cart. (Nishibun TR at pp. 27, 28; Sonstein TR at p. 14). Mr. Nishibun also indicated that he thought the sleeves were tagged and returned to either the foreman or supply room but did not recall specifically. (Nishibun TR at p. 26). No other evidence was obtained regarding what was done with the sleeves after the removal. Thus, there is a direct conflict between the testimony of Mr. Sealy and Mr. Daniel on the one hand and Mr. Culahara and Mr. Nitta on the other hand which would require a credibility determination by any trier of fact in any subsequent action³⁶. It is evident that a finding in favor of Mr. Daniel's testimony and Mr. Sealy's testimony would indicate an intentional violation of Section 609(a) by certain of HAL management personnel³⁷ and would greatly aggravate non-compliance with Section 609(a) of the Act.

³⁶ At the time of his deposition, Mr. Daniel was no longer employed with HAL and had moved to Kentucky where he owns an auto and truck part business. (Daniel TR at p. 8). He testified that he left HAL after being asked to sign off some work that he did not consider proper. while HAL in its brief contends his testimony is clouded by his admitted friendship with Mr. Norris and Mr. Sealy. (HAL Brief at p. 21) on balance I considered Mr. Daniel to be a credible witness in terms of demeanor and lack of personal interest.

³⁷ No direct evidence was found which connected Mr. Finazzo, Mr. Wells, Mr. Ogden, or Mr. Honma with any alleged intentional destruction of the sleeves or knowledge of any such actions by Mr. Culahara or Mr. Nitta. There is a question as to whether HAL middle managers would take such action on their own volition.

The credibility of Mr. Sealy's testimony is subject to attack in view of his denial or lack of recollection of turning the notes over to the FAA on September 15, 1987, a point which is vigorously argued by HAL. (HAL Brief at pp. 20, 21). As stated previously, I do conclude that Mr. Teixeira's and Mr. Beckner's testimony is more credible on that particular point. It should be noted that at the time of his deposition, Mr. Sealy was still an employee of HAL and was observed to be nervous throughout his testimony. As to Mr. Nitta and Mr. Culahara, no adverse observations were made as to their demeanor during their deposition. both individuals are still HAL employees and clearly have a direct interest in the outcome of the investigation in that the actions described by Mr. Daniel and Mr. Sealy would in my opinion constitute individual violations of Section 609(a) of the Act.

In the past, Section 609(a) of the Act has been enforced by the issuance of an Order of Suspension under that section suspending the pertinent airman certificate until the airman accomplishes the requested re-examination or reinspection. In this case, the requested reinspection cannot be accomplished at this time and, in fact, could not have been accomplished after September 20, 1987. In fact, this case differs from the reported cases in that in this case the action, or lack of action by HAL prevented the accomplishment of the re-inspection. Therefore a remedial Order of Suspension could serve no purpose. Further, a punitive Order of Suspension would appear to be barred by the National Transportation Safety Board's stale complaint rule (821 CFR 33).

Section 901(a)(1) of the Federal Aviation Act of 1958, as amended, provides that any person who violates any

provision of Title VI of the Federal Aviation Act of 1958 shall be subject to a civil penalty not to exceed \$1000 for each violation³⁸. While I am not aware of prior precedent on this point, it is my opinion that Section 901(a)(1) would be applicable to cases involving non-compliance with the reexamination/-reinspection provisions of Section 609(a) of the Federal Aviation Act of 1958 which is clearly a provision of Title VI of the Act.

B. Compliance with Section 43.13 or 121.153(a)(2) of the Federal Aviation Regulations.

The Order of Investigation specifically directed me to ascertain the condition of the removed sleeves and whether HAL or any of its employees may have violated Sections 43.13 or 121.153(a)(2) of the Federal Aviation Regulations.³⁹

³⁸ This is the provision that was in effect in 1987. The statute has, of course, subsequently been amended.

³⁹ Section 43.13 of the Federal Aviation Regulations (14 CFR, Section 43.13) provides:

(a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in Section 43.16. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that

This portion of the investigation examines and considers the following issues:

1. Whether the evidence indicated that any of the sleeves on aircraft 68 and 69 were in a damaged condition at the time of their removal?
2. If so, whether any of the damage was so severe as to be beyond manufacturer's tolerance and limits?
3. Whether any damage beyond tolerance occurred in such a manner as to constitute a violation of either Sections 43.13 or 121.153(a)(2) of the Federal Aviation Regulations?

At the outset, it must be emphasized that this investigation was greatly hampered by the fact that the sleeves

equipment or apparatus or its equivalent acceptable to the Administrator.

(b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness).

Section 121.153(a)(2) of the Federal Aviation Regulation [14 CFR Section 121.153(a)(2)] provides:

(a) Except as provided in paragraph (c) of this section, no certificate holder may operate an aircraft unless that aircraft -

(2) Is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, including those relating to identification and equipment.

were destroyed during the weekend of September 18-20, 1987. Because of this, the sleeves were not available for expert testing or examination to ascertain their condition. Accordingly, my investigation and report centers upon an examination of the records that are available and on the testimony of the various witnesses.

As to the first issue above, the evidence conclusively indicates that a number of the sleeves removed from aircraft 68 and 69 had sustained some sort of damage at the time they were removed from these aircraft. First of all, a majority of the persons who saw the sleeves on that weekend testified to observing some damage on at least some of the sleeves. Of these, eight witnesses described the damage as consisting of cuts, gouges or scratches⁴⁰. Three witnesses testified that they recalled seeing marks

⁴⁰ Mr. Murata described the two sleeves he saw as gouged or badly scratched. (Murata TR at pp. 12, 13). Mr. Daniel testified that he saw sleeves from the two aircraft with severe cuts, wear marks and a chisel mark. (Daniel TR at pp. 43, 44, 46). Mr. Sealy testified that he observed gouges and scratches on six sleeves. (Sealy TR at pp. 20, 21). Mr. Katano testified that he observed dents, scratches and gouges on a number of the sleeves. He inspected between 5 and 10 sleeves and some were not damaged but he could not recall how many. (Katano TR at pp. 26, 27, 31). Mr. Ikezawa testified that he looked at two sleeves which were in the condition reflected by him in the records which indicated they were gouged. (Ikezawa TR at pp. 25, 26). Mr. Kagawa had no present recollection but confirmed that the records correctly indicated his observation at the time – that the sleeves were gouged. (Kagawa TR at pp. 30, 31, 32). Mr. Shimabukuro testified that he saw scratches on two or three sleeves. (Shimabukuro TR at p. 14). Mr. Nishibun testified that he saw scratches and small gouges on three of the sleeves. (Nishibun TR at p. 21).

on some of the sleeves but could not describe the nature of the marks. (Kam TR at pp. 13, 15; Sonstein TR at p. 15; Nitta TR at p. 28). Only two witnesses testified to not seeing any marks or scratches on any of the sleeves they looked at (Ugale TR at pp. 14, 15; Mihara TR at p. 49)⁴¹.

As to the records examined, neither of the HAL Forms 1128 for aircraft 68 and 69 contained any information concerning the condition of the sleeves other than that a number of them were removed. However, the HAL Forms 46 indicate that the sleeves had some sort of damage. Four of the sleeves were indicated as being gouged; two were described as damaged; and another had evidence of "axle sleeve reworked (grinded)." (Ikezawa Deposition FAA Exhibit 2). In summary, there is conclusive evidence that the majority of the sleeves had damage at the time of their inspection.

While the above testimony and records readily establishes that the sleeves had experienced some degree of damage, the evidence adduced was not as complete as regards the second issue – whether the damage on the sleeves exceeded the manufacturer's tolerance limits. First, neither the HAL forms 1128 or 46 contain any entries regarding this question. In addition, HAL did not prepare any reports concerning the conditions of the sleeves other than the HAL Forms 1128 or 46. (Ogden TR at p. 36). Thus, there are no records relating to this issue.

⁴¹ It appears that Mr. Ugale only saw the two sleeves which he cleaned and which were later turned over to the FAA. It is agreed that these two sleeves did not have any gouges or scratches on them.

Of the above mentioned witnesses to the damage, all but three testified that they did not have at any opinion or conclusion as to whether any of the damage they observed exceeded tolerance limits. The investigation did produce three witnesses – Mr. Murata, Mr. Daniel and Mr. Sealy – who all testified that some of the sleeves were out of tolerance. Mr. Murata testified that both of the sleeves he inspected on aircraft 69 were beyond manufacturer's limits for damage. (Murata TR at pp. 50, 51). Mr. Daniel testified that he saw two or three sleeves that he considered out of tolerance. (Daniel TR at pp. 45, 46, 47). Mr. Sealy testified that he considered six of the sleeves on aircraft 68 and 69 to be beyond damage tolerance limits. (Sealy TR at p. 20). This direct evidence is summarized in the following paragraph.

Mr. Murata testified that he looked at two sleeves while they were still on aircraft 69. The first sleeve was badly sanded and he was able to put his fingernail in the cut area which he estimated to be approximately 1/16 inch deep and about 2 inches long. He further testified that the second sleeve was badly galled and that the bearing race (where the tires ride) was also badly galled. (Murata TR at pp. 12, 13). Mr. Murata testified that he was not familiar with the manufacturer's tolerance at the time of his inspection but became familiar with them within the next week. (Murata TR at p. 14). Based on his observations, Mr. Murata was of the opinion that the two sleeves were not within the manufacturer's damage tolerance. (Murata TR at pp. 50, 51). Mr. Murata measured the

cut by placing his fingernail in it and did not ask for or use a micrometer. (Murata TR at p. 52)⁴².

Mr. Daniel testified that he was involved in removing the wheels on aircraft 68 and 69. (Daniel TR at pp. 39, 49). He testified that both aircraft had some severely worn sleeves. (Daniel TR at p. 43). One of the sleeves had a vertical cut which appeared to him to have resulted from the removal of a frozen bearing by a pneumatic tool (Daniel TR at pp. 44, 45). Several of the sleeves had gouges and scratches. (Daniel TR at p. 45). One of these had chisel marks apparently the result of someone trying to remove the sleeve. (Daniel TR p. 46). He testified that each of the aircraft had at least one sleeve that was out of tolerance and he thought that one aircraft had two sleeves beyond tolerance. (Daniel TR at pp. 62, 63). Mr. Daniel did not measure any of the sleeves. (Daniel TR at p. 65). He also remembered Mr. Murata looking at one or two sleeves. (Daniel TR at p. 74). Mr. Daniel recalled that the sleeve was badly gouged where it rests on the axle with the width of the gouge being approximately 1 inch. (Daniel TR at p. 74). He agreed that this sleeve was out of tolerance and shared this opinion with Mr. Murata. (Daniel TR at p. 75). Mr. Daniel was aware of the damage limits per the manufacturer's manual. (Daniel TR at pp. 31, 32).

Mr. Sealy testified that he observed six sleeves that had damage which in his opinion exceeded the manufacturer's tolerance. (Sealy TR at p. 20). He was aware of the

⁴² Mr. Murata's description of the damage was from his memory. He did not include a description of the damage in his notes. (Murata TR at p. 52).

tolerance limits and produced a copy of the pertinent manual pages at his deposition. (Sealy Deposition FAA Exhibit 2; Sealy TR at p. 22). Mr. Sealy testified that, based on experience, you could usually tell if a crack was beyond the tolerance limit of five thousandth of an inch – if you could see the gouge then it would be greater than that tolerated. (Sealy TR at pp. 53, 54). He testified that he did not run any dye penetrant test on the sleeves or personally measure them. (Sealy TR at p. 43). Mr. Sealy recalled that Mr. Murata looked at three sleeves and that these were three of the six damaged sleeves he considered out of tolerance. (Sealy TR at p. 24).

The above testimony indicates that from two (Murata) to six (Sealy) sleeves were damaged beyond tolerance. The two sleeves observed by Mr. Murata can be specifically identified as the number 1 and number 2 axle sleeves on aircraft 69. Mr. Ikezawa testified that the two sleeves he inspected and entered on the HAL Forms 46 were the same sleeves that Mr. Murata looked at (Ikezawa TR at p. 24)⁴³. FAA Exhibits 2 and 3 to the Ikezawa deposition establish that these were the sleeves on axles 1 and 2 on aircraft 69. It is concluded that these are the only two sleeves that can be specifically be identified for which there is evidence of damage beyond tolerance. Mr. Daniel was not certain which aircraft the sleeve with the die cut was on and could only indicate that each aircraft had at least one sleeve out of tolerance. (Daniel TR at pp. 62, 66). Mr. Sealy could not identify which damaged sleeves were on which aircraft.

⁴³ Mr. Murata likewise testified that Mr. Ikezawa was present when he arrived to look at the aircraft. (Murata TR at p. 10).

In evaluating the above evidence, the following points are considered pertinent. As mentioned previously, there is no scientific evidence concerning the degree of damage. The sleeves were destroyed that weekend and were not tested or measured at that time due primarily to HAL instructions that the sleeves be replaced if there was any damage. In this regard, HAL management conceded that they did not know whether any of the removed sleeves were beyond tolerance. (Wells TR at p. 60; Ogden TR at p. 36). As to the two sleeves viewed by Mr. Murata, all three witnesses – Mr. Murata, Mr. Daniel and Mr. Sealy – agreed that those sleeves were out of tolerance. In addition, Mr. Ikezawa's description of the damage for these sleeves is similar to Mr. Murata's testimony⁴⁴. The investigation revealed no conflicting testimony on this point and, therefore, witness credibility should be determined based on the background of the witnesses and the consistency of the testimony with not only other testimony but also on its overall technical reliability and accuracy⁴⁵. As to the additional alleged

⁴⁴ Mr. Ikezawa described the number 1 axle sleeve as follows: "Wear Gouges On Lower Half of Sleeve." (Ikezawa Deposition FAA Exhibit 3).

He described the damage on the number 2 axle sleeve as follows: "#2 Axle Sleeve Evidence of Axle Sleeve Reworked – (Grinded)." (Ikezawa Deposition FAA Exhibit 2).

⁴⁵ Mr. Murata has impressive credentials in the field of aircraft maintenance as reflected on pages 4 and 5 of his deposition. Mr. Daniel also appears to be a well qualified mechanic and also has extensive experience in other machine work. (Daniel TR at pp. 9, 10, 11). In this connection, Mr. Nitta considered him a competent mechanic and indicated he never had any real problem with him. (Nitta TR at p. 37). Prior to working for HAL,

unacceptable sleeves testified to by Mr. Daniel and four additional sleeves testified to by Mr. Sealy, no corroborating evidence was obtained.

Finally, there is additional investigation beyond the scope of this inquiry which could result in further evidence to either support or contradict the testimony of Mr. Murata, Mr. Daniel and Mr. Sealy on this issue. First, Mr. Daniel testified that he had examined the allegedly damaged sleeve on aircraft 70 and that the sleeves observed by Mr. Murata were similar to, if not worse than, the sleeves on aircraft 70. (Daniel TR at p. 70). At an appropriate time, the data regarding the sleeve taken from aircraft 70 could be examined and analyzed to see if it would shed any light on the condition of the sleeves from aircraft 69. Secondly, expert information and opinion could be sought on the issue of whether a scratch or gouge readily visible and for which a fingernail could be inserted would likely or definitely exceed the .005 inch tolerance limit.

As to the third issue of whether there were any violations of Sections 43.13 or 121.153(a)(1) of the Federal Aviation Regulations, it is concluded that the existence of damage on the sleeves beyond the tolerance limits set forth in the manufacturer's manual would result in the aircraft not being in an airworthy condition and not

Mr. Sealy worked for eight years for Douglas Aircraft Corporation building DC-9 and DC-10 aircraft. (Sealy TR at p. 12). On balance, both Mr. Murata and Mr. Daniel were considered to be credible witnesses. In addition to the credibility point previously discussed, Mr. Sealy's testimony did differ as to certain details from that of the other witnesses.

meeting all airworthiness requirements. Similarly, the aircraft would not be at least equal to its original or properly altered condition. This is based on the fact that the sleeve preforms [sic] a direct safety function in protection of the axle from damage from a frozen bearing. A sleeve with damage exceeding that described in the Douglas Manual would both be not equal to its original or properly altered condition and not maintained in accordance with the manufacturer's requirements but also could result in a catastrophic failure of the landing gear and wheel itself.

The above discussion as to the nature of the damage to the sleeves constitutes the first part of the question of whether the evidence indicates any violations of the Federal Aviation Regulations in connection with the sleeves. In addition, each of these regulations involves separate individual subissues. In order to violate Section 121.153(a)(1), it is necessary that the aircraft be operated. Attachment 2 contains information concerning the operation of the aircraft prior to September 18, 1987. However, while we know when the aircraft was operated, there was no direct evidence uncovered by the investigation as to the condition of the sleeves on any one of these particular flights. In other words, there was no testimony obtained which indicated that the sleeve was observed to be damaged on a particular date prior to September 18, 1987, nor was this information contained in any of the records examined. Here again, additional expert analysis and opinion beyond the scope of this investigation may furnish pertinent circumstantial evidence. I am specifically referring to the issue of the duration of time in which the damage to the sleeves could reasonably be expected to

occur during the operation of the aircraft. As discussed previously, the evidence indicates that the damage to the two sleeves on aircraft 69 (as well as the damage to the other sleeves) could not have resulted from the removal of the sleeves on the weekend of September 18, 1987, as the sleeves were still on the aircraft when they were observed by the witnesses. It is also noted that the aircraft flew on numerous flights on the days immediately prior to the inspection and removal (see Attachment 2).

The question of whether there was a violation of Section 43.13 also raises a separate subissue. Section 43.13(a) and (b) pertain to persons performing maintenance, alteration or preventive maintenance on an aircraft, engine, propeller or appliance. Thus, an essential element of any violation of that section requires that maintenance, preventive maintenance or alteration have been performed by the alleged violator. Maintenance is defined as meaning:

inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance. (14 CFR Section 1.1).

From this definition, it is evident that the inspection of the sleeves by an airline mechanic or inspector would constitute maintenance.

The testimony indicated that the inspection of the sleeves is not specifically required in the manufacturer's manual to be performed at a particular time. The Douglas DC-9 Maintenance Manual covering maintenance practices for the DC-9 Main Gear wheel and Tire Assembly does not specifically call for the inspection of the sleeve itself. The manual does call for an inspection of the axle

for damage. (Ogden TR at p. 30; Ogden Deposition FAA Exhibit 5, pp. 202, 203). The manual also provides specific guidance in a later part as to how to conduct an inspection or check of the sleeve. (Ogden Deposition FAA Exhibit 6).

The testimony of the witnesses indicates that the inspection of the sleeve would be considered a normal routine mechanic's inspection. (Ogden TR at p. 23). There was some differences of opinion as to when this inspection should be accomplished. Some witnesses testified that it should be done when replacing a tire (Nitta TR at p. 36; Sonstein TR at p. 19; Kam TR at p. 23) whereas others did not feel that the replacement of the tire would involve an inspection of the sleeve (Omoto TR at p. 33; Mihara TR at p. 35). It was generally agreed that the sleeve should be inspected anytime the wheel or brake assemblies are replaced or where there is indication of a seized bearing. (Ogden TR at p. 23; Mihara TR at pp. 35, 36; Ikezawa TR at p. 30; Katano TR at pp. 37, 38).

There was no direct testimony given during the investigation which indicated the existence of any damaged sleeves prior to September 18, 1987. I did obtain all of the HAL Forms 46 which referred to axle assemblies for aircraft 68 and 69 from the period from May 1, 1987 through September 17, 1987, and these were introduced and attached to the depositions of the pertinent HAL inspectors and mechanics. Attachment 6 contains a list of these exhibits. Among the more recent forms (in relation to September 18, 1987) is a form indicating that the number 1 tire assembly on aircraft 69 was replaced on August 13, 1987. (Mihara Deposition FAA Exhibit 6, p. 6). Other records show work being done on aircraft 68 on

September 6, 1987, and on the number 4 axle on aircraft 69 on September 8, 1987. (Estano Deposition FAA Exhibit 5, p. 4; Mihara Deposition FAA Exhibit 6, p. 7).

As with the issue involving Section 121.153(a)(2), the obtaining of expert review and opinion as to how long the conditions described by Mr. Murata, Mr. Daniel and Mr. Sealy could reasonably have been expected to exist would be pertinent to the issue of whether there were any violation of the section.

[p. 112] IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.	)	<u>VOLUME 2</u>
HAWAIIAN AIRLINES, INC.,)	
Defendant.)	
-----)	

CONTINUED DEPOSITION OF NORMAN MATSUZAKI,

Taken on behalf of Plaintiff at the offices of Cades Schutte Fleming & Wright, 1000 Bishop Street, 11th Floor, Honolulu, Hawaii, 96813, commencing at 10:45 a.m. on Monday, June 26, 1989.

REPORTED BY: JOAN IZUMIGAWA, CSR No. 136
Notary Public, State of Hawaii

* * *

[p. 164] take it that you obtained that information from Mr. Culahara. Is that accurate?

MR. RICKTENWALD: I'll object that that misstates his testimony.

A I'm not sure, and I don't remember.

Q (By Mr. Boyle) Okay. Well, is there anybody who was present who could have possibly given you that information other than Mr. Culahara?

MR. RICKTENWALD: Calls for the witness to speculate.

A I wouldn't know.

Q (By Mr. Boyle) Well, then how did you know that "all we requested was his signature on what he exactly did"?

MR. RICKTENWALD: Asked and answered.

A I believe I stated before that all I - all management requested was for him to sign off work which he actually did. And if there was any - if there was anything contrary to it he didn't like, he can put an asterisk there and put down whatever he was entitled.

Q (By Mr. Boyle) What did he actually do?

A He was assigned to do whatever maintenance that was supposed to be done. I'm not sure whether the work to be - the work that had to be done had been written up in advance on a company form or what.

* * *

[p. 1] IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.	)	<u>VOLUME 1</u>
HAWAIIAN AIRLINES, INC.,)	
Defendant.)	
-----)	

DEPOSITION OF JUSTIN CULAHARA,

Taken on behalf of plaintiff at the offices of Cades Schutte Fleming & Wright, 1000 Bishop Street, 11th Floor, Honolulu, Hawaii, 96813, commencing at 9:40 a.m. on Wednesday, June 28, 1989.

REPORTED BY: JOAN IZUMIGAWA, CSR No. 136
Notary Public, State of Hawaii

* * *

[p. 137] Q What happened next?

A Okay. Then I seen Norris come over, because apparently about that time the tire change was already completed. The tire installation was completed, with three guys on over there. So he came over there. So since he walked over to me, I pointed out to Norris, I says, "Norris, would you sign off the tire change on Number 2 engine?" I mean Number 2 tires.

He says – to the best of my recollection, his answer was, "You seen what I showed you," or something to that effect. "You seen what it is."

So I told him, "No, you just sign off for the work that you have completed." I says, "I will take care the sleeve with Mr. Wong. We're going to carry it over. We dye-checked it, we looked at it. We're satisfied with it. We're going to carry it over. I want you to sign off for only the work you have completed."

And his answer to me – and he says – he kept reverting back. Of course, there were words exchanged. He keep coming back and says, "No, I'm going – you seem what it looks like."

I told – I can back again, says, "I – just sign off the work that you did, the tire change."

He said, "Ah, I'm not going to sign off."

So I says, "You telling me you refuse to sign [p.138] off the work you completed?"

He said, "Yes."

So I says, "Well, if you do – I'm ordering you at this point in time to sign off for only the work you performed."

And he says, "No. Do whatever you have to do."

So I says, "Okay. As of this point in time, you are suspended."

Then Mr. Sealy proceeded to walk over where we were. So I grabbed Mr. Sealy and told Mr. Sealy – and explained to Mr. Sealy what I had done to Mr. Norris.

And I told Mr. Sealy and I explained to him that, "Look, Sealy. I just" – I had just suspended Norris for refusing to sign off his work for his work performed on that – on that tire change. And I explained to him that, "The sleeve portion, you need not have to worry, for I and Mr. Wong will carry it over because we had pulled a dye check on it and we both satisfied with it." And I says, "If you and I can sign if off, no problem."

And Mr. Sealy concurred with me. He signed the – he walked over, he signed it off, and I put my name next to his. We put the – we put down here the tire, the serial number, off and on.

And that's all that was said.

MR. BOYLE: That was a lengthy answer. May I

* * *

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.	)	AFFIDAVIT OF
HAWAIIAN AIRLINES, INC.,	)	THOMAS
Defendant.	)	YAMACHIKA
_____)	

AFFIDAVIT OF THOMAS YAMACHIKA

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF HONOLULU)

THOMAS YAMACHIKA, being first duly sworn,
states:

1. I am an attorney with Cades Schutte Fleming & Wright, counsel for Plaintiff Grant T. Norris.

2. Exhibit A is a true and correct copy of an affidavit of Grant T. Norris, with attached exhibits, that was filed in Civil No. 88-00010 HMF in the United States District Court, District of Hawaii ("Federal Action"). A current affidavit to be filed in this action has been sent to Mr. Norris and will be filed prior to the hearing on this motion.

3. Exhibit B is a true and correct copy of a transcript from an arbitral hearing that this office obtained from the International Association of Machinists.

4. Exhibits C-1 through C-4 are true and correct color xerox copies of photographs taken of the axle sleeve taken off Aircraft 70 (N709HA). The photographs were taken on May 20, 1988, at a deposition upon written interrogatories at which I was present. The photographs accurately reflect the condition of the axle sleeve on that date.

5. Exhibits D and E are true and correct copies of letters from the FAA. Copies of these letters were produced by Defendant.

6. Exhibit G is a true and correct copy of an Order of Investigation issued by the FAA.

7. Exhibits H and I are true and correct copies of decisions and orders filed in the Federal Action.

8. Exhibit J is a true and correct copy of an order entered by the United States Court of Appeals, Ninth Circuit.

Further affiant sayeth naught.

/s/ Thomas Yamachika
THOMAS YAMACHIKA

Subscribed and sworn to before me
this 1st day of August, 1989.

/s/ Judy Kay Fur
Notary Public, State of Hawaii

My commission expires:
2/21/91

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.	)	AFFIDAVIT OF
	)	EDWARD
HAWAIIAN AIRLINES, INC.,	)	deLAPPE BOYLE
Defendant.)	
_____)	

AFFIDAVIT OF EDWARD deLAPPE BOYLE

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF HONOLULU)

EDWARD deLAPPE BOYLE, being first duly sworn,
states:

1. I am the attorney for plaintiff.
2. The attached Exhibit "F" is a true and correct copy of a headline article that appeared in the *Honolulu Star-Bulletin*, Hawaii's most widely circulated evening paper, on May 12, 1988.
3. On May 12, 1988, your affiant was interviewed by KGMB-TV, the Hawaii CBS affiliate, in connection with the development mentioned in that newspaper article. Portions of this interview were broadcast as part of the opening story on KGMB-TV's 6:00 p.m. and 10:00 p.m. news telecasts on that date.
4. On May 13, 1988, your affiant was interviewed by KITV-TV, the Hawaii ABC affiliate, in connection with the

same development. Portions of this interview were broadcast on KITV-TV's news telecasts on that date.

5. This affidavit, and the attached exhibit, are offered to evidence the magnitude of local concern over the events that are the subject of this lawsuit.

Further affiant sayeth naught.

/s/ Edward D. BOYLE
EDWARD deLAPPE BOYLE

Subscribed and sworn to before me
this 1st day of August, 1989.

/s/ Judy Kay Fur
Notary Public, State of Hawaii

My commission expires:
2/21/91

EXHIBIT A
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.	)	AFFIDAVIT OF
HAWAIIAN AIRLINES, INC.,	)	GRANT T.
Defendant.	)	NORRIS

AFFIDAVIT OF GRANT T. NORRIS

STATE OF HAWAII)	
	)	SS:
CITY AND COUNTY OF HONOLULU)	

GRANT T. NORRIS, being first duly sworn, states as follows:

1. I am the plaintiff in this action. I am making this affidavit upon personal knowledge except where stated otherwise.

2. I have been, and still am, a licensed aircraft mechanic with an Airframe and Powerplant ("A&P") rating. One of the inscriptions on the back of my license reads:

REPAIRMAN OPERATIONAL RESTRICTION

The holder hereof shall not perform or approve alterations, repairs or inspections of aircraft except in accordance with the applicable

airworthiness requirements of the Federal Aviation Regulations, or such method, techniques and practices found acceptable to the Administrator.

3. From February 2, 1987 to August 3, 1987, I was employed as a mechanic by defendant Hawaiian Airlines, Inc. ("HAL").

4. In July 1987, my shift typically would start at 9 p.m. at night and end at 5:30 a.m. the next morning.

5. At approximately 3:30 a.m. on July 15, 1987, I was working on HAL's Aircraft 70 (Serial No. N709HA). I was doing a routine preflight inspection on that aircraft, and I noticed that the left No. 2 tire was worn and needed to be changed. I advised the lead mechanic who, after consulting with a HAL inspector, authorized the tire change.

6. When I and other mechanics removed the tire, we discovered that the wheel bearing was frozen or stuck onto the axle sleeve. We had difficulty removing the bearing from the axle sleeve, and we approached the lead mechanic and the inspector for their advice. We continued to be unsuccessful, and at about 4:35 a.m. the Base Maintenance Line Manager personally came over to supervise.

7. We eventually removed the bearing at about 4:45 a.m. I, and the others present, noticed that the axle sleeve was scarred and grooved, with gouges and burn marks clearly visible.

8. An axle sleeve, sometimes called an axle spacer, is an aircraft part that fits snugly around the axle. It is designed to protect the axle from damage. An axle sleeve

normally has an external surface that is so highly polished as to be mirror-like. I know that the reason why the surface is so polished is so that inner race of the wheel bearing that is put on over it will spin freely around the axle sleeve. If the axle sleeve surface is uneven or damaged, the inner bearing race will bind to the axle sleeve, forcing the bearing itself to absorb all of the stress incident to take off or landing.

9. At the time I discovered the damage on July 15, 1987, I did not remember exactly what was the acceptable tolerance for damage specified in the manufacturer's manual. I knew, however, that the tolerance could not have been more than at most a few hundredths of an inch and the damage that I saw clearly exceeded that. I later found out from the FAA that the acceptable tolerance for damage is 0.005 inch.

10. I know that when an aircraft lands, the landing gear wheels will speed up from rest to approximately 150 miles per hour in a fraction of a second. The heat generated by this sudden acceleration, if absorbed by the bearing alone, could be enough to melt the bearing. If that happened, the landing gear could fail. I believed, from the scarring and burn marks on the axle sleeve, that someone had removed what must have been a completely destroyed bearing from this axle sleeve and then installed another bearing over the same sleeve.

11. At that time, there was no doubt in my mind that the part was unsafe and needed to be changed. The mechanic who was working with me on that shift agreed, as did other mechanics who were also present.

12. HAL's Base Maintenance Line Manager (whom I will refer to as the "supervisor") saw the condition of this axle sleeve. The supervisor is responsible for maintaining the published flight schedules. The supervisor had told us that Aircraft 70 was due back on line at 6:30 a.m., which meant that the aircraft had to be out of the barn by 6:00 a.m.

13. The supervisor directed us to hand-sand the rough edges of the axle sleeve and to put a new bearing and tire on over it. At that point, I told the lead mechanic that I did not want to be responsible for reinstalling the tire.

14. Aircraft No. 70 was returned to service and in fact did carry passengers that morning.

15. At about 5:15 a.m., the supervisor approached me and asked me to sign the maintenance record for installation of the No. 2 tire. I told the supervisor that if he could show me in the maintenance manual where it said that the axle spacer was in a satisfactory condition then I would sign. I also said that I, after checking with the lead mechanic, did not actually perform the tire installation but only assisted.

16. The supervisor did not check the manual or allow me to check the manual, but told me that if I did not sign I would be suspended. I said I would not sign. I was not offered the option of signing off on the tire removal only. The supervisor suspended me on the spot, pending a termination hearing.

17. Later that morning, as soon as I got home, I telephoned the FAA to tell them that there was a problem

with Aircraft 70, although I did not say what the problem was.

18. In the late morning or early afternoon of July 15, 1987, after the supervisor had gone off shift, I went back to pick up my tools and then went to the office of HAL'S Assistant Director of Base Maintenance (the "Assistant Director"). While I was waiting for him, I had started to leaf through the maintenance manual, but I did not finish because the Assistant Director arrived and stopped me. The Assistant Director told me that he had heard of the events that had happened earlier that morning. I told him that I had called the FAA.

19. The Assistant Director had written a letter formally advising me that I was charged with insubordination. The Assistant Director did not let me see the maintenance manual. In fact, he literally chased me from his office, saying that whatever I or the Union said, I was "gone."

20. A true and correct copy of the letter I received, along with notations of mine requesting additional time before the hearing and the Assistant Director's acceptance of this request, is attached as Exhibit "1".

21. My termination hearing was held on July 31, 1987. That was a Friday. The decision to discharge me for insubordination was issued the following Monday, August 3, 1987.

22. A true and correct copy of the termination decision is attached as Exhibit "2." The decision indicates that a copy of it was sent to HAL's Vice President for Maintenance and Engineering, Howard Ogden.

23. On September 21, 1987, I received a letter from HAL's Vice President for Maintenance and Engineering. That letter, a true copy of which is attached as Exhibit "3", offered to reinstate me without any back pay for the period since my firing, with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could result in my getting fired again.

24. When I had gotten the letter, however, I was in California. I was preparing to attend nursing school because I figured that my career in the airline industry had ended.

25. The attached Exhibit "5" is a true and correct copy of the page of my collective bargaining agreement containing Article XV, Paragraph H.

Further affiant sayeth naught.

/s/ Grant T. Norris
GRANT T. NORRIS

Subscribed and sworn to before me
this 5th day of January, 1988.

/s/ Monica G. L. Young
Notary Public, State of Hawaii

My commission expires:
9/29/89

EXHIBIT A
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.	)	AFFIDAVIT OF
HAWAIIAN AIRLINES, INC.,	)	THOMAS
Defendant.)	YAMACHIKA
_____)	

AFFIDAVIT OF THOMAS YAMACHIKA

STATE OF HAWAII)	
	)	SS:
CITY AND COUNTY OF HONOLULU)	

THOMAS YAMACHIKA, being first duly sworn,
states as follows:

1. I am an associate with Cades Schutte Fleming & Wright, attorneys for plaintiff.

2. The attached Exhibit "4" is a true and correct copy of a document I obtained from the Union's file on the grievance that Grant T. Norris filed relating to his discharge.

3. The attached Exhibit "6" is a true and correct copy of those pages of the 1987 Hawaii Session Laws containing Act 267, the Hawaii Whistleblowers' Protection Act of 1987.

Further affiant sayeth naught.

/s/ Thomas Yamachika
THOMAS YAMACHIKA

Subscribed and sworn to before me
this 12th day of January, 1988.

/s/ Monica G.L. Young
Notary Public, State of Hawaii

My commission expires: 9/29/89

EXHIBIT A

(LOGO)

HAWAIIAN
AIRLINES

July 15, 1987

/s/ Grant Norris 7/15/87
Letter Received - Date -
Hand Deliver LTR.Mr. Grant T. Norris
1125A 2nd Avenue, Apt. 4
Honolulu, HI 96816

Dear Sir:

This is to advise you that a hearing will be held on Friday, July 17, 1987 at 10:00 a.m. in the office of the Director of Base Maintenance, H. Honma. The charge is Group I - Violations - Reprimand to Discharge; Item 8 - Insubordination, failure or refusal to obey instructions or perform work as required.

If you and your union representative is not agreeable to this date, feel free to contact me at x 237.

Respectfully,

/s/ N. Matsuzaki
N. Matsuzaki
Hearing Officer

NM:hpa

cc: H. Honma
H. E Ogden
IRD
IAM - Floyd Baptist
J. Chun

EXHIBIT A

(LOGO)
HAWAIIAN
AIRLINES

AUGUST 03, 2987 [sic]

BASE MAINTENANCE & ENGINEERING
JULY 31, 1987
SUSPENSION HEARING

A HEARING WAS HELD IN THE BASE MAINTENANCE OFFICE JULY 31, 1987 AT 10:00 A.M.

REPRESENTING THE UNION: F. BAPTISTRESPRESENTING [sic]
THE COMPANY:

J. CULAHARA

SUSPENDED EMPLOYEE:G. NORRIS - DATE
OF HIRE: FEBRU-
ARY 2, 1987COMPANY OBSERVER:

C. ROBINSON

THE HEARING OFFICER PRIOR TO THE START OF THIS HEARING EMPHASIZED THE EMPLOYEE REQUESTED THE LATE SCHEDULED TIME AS STATED ON THE LETTER DATED JULY 15, 1987 NOTIFICATION TO HIM.

QUESTION AT ISSUED:

EMPLOYEE'S REFUSAL TO SIGN WORK RECORDS FOR WORK PERFORMED BY HIM; SUBSEQUENTLY, SUSPENDED FOR INSUBORDINATION AFTER A DIRECT ORDER WAS GIVEN TO DO SO.

POSITION OF UNION:

EMPLOYEE REFUSAL TO SIGN COMPANY WORK RECORD BASED ON; HE FELT IT WAS UNSAFE FOR WORK PERFORMED.

POSITION OF COMPANY:

THE COMPANY IS RESPONSIBLE FOR THE AIRWORTHINESS OF IT'S AIRCRAFT AND THE PERFORMANCE OF MAINTENANCE IN ACCORDANCE WITH IT'S [sic] MANUAL, WHICH MUST ENSURE COMPLIANCE WITH THE FAR'S. ALSO, COMPETENT PERSONNEL, MR. HENRY WONG, QUALITY CONTROL INSPECTOR, WHO IS TECHNICALLY QUALIFIED TO ANALYZE, JUDGE THE MERIT OF EACH ITEM AND MAKE THE DECISION WHETHER OR NOT TO SIGN THE ITEM OFF AS AIRWORTHY.

THE BASE MAINTENANCE LINE MANAGER, MR. JUSTING [sic] CULAHARA, PERSONALLY OBSERVES THIS WORK BEING DONE TO THE EXTENT NECESSARY TO INSURE THAT IT IS BEING DONE PROPERLY. HE IS READILY AVAILABLE IN PERSON FOR CONSULTATION. HE SEES ALL AIRCRAFT IN A CONDITION SATISFACTORY TO INSPECTION SECTION PRIOR TO RELEASE FOR FLIGHT.

IN THIS CASE, THE DECISION IN SIGNING A WORK SHEET SIGNIFY ONLY ITEMS COVERED BY HIS SIGNATURE. THIS WAS THE ONLY REQUISITE IN THIS CASE. A DIRECT ORDER WAS GIVEN AND HIS REFUSAL TO COMPLY BROUGHT ABOUT THIS UNHAPPY SITUATION. MANAGEMENT HAS NEVER MANDATED FOR A "SIGN OFF" FOR WORK NOT DONE BY AN INDIVIDUAL.

DECISION:

MR. GRANT NORRIS TERMINATED AS OF THIS DAY, AUGUST 3, 1987, FOR INSUBORDINATION.

/s/ Norman Matsuzaki

NORMAN MATSUZAKI

ASSISTANT DIRECTOR OF BASE MAINTENANCE
HEARING OFFICER

NM:hpa

cc: GRANT NORRIS
IRD
A.P. WELLS
H.E. OGDEN
C. ROBINSON
H. HONMA
IAM

EXHIBIT A

(LOGO)

HAWAIIAN
AIRLINES

September 10, 1987

Mr. Grant T. Norris
1125-A 2nd Avenue, #4
Honolulu, HI 96816

Dear Mr. Norris:

I have reviewed your case file very carefully and, as the next appropriate individual in the chain of command, I have decided to mitigate the punishment imposed on you from discharge to suspension without pay for the period August 3, 1987 to September 15, 1987.

You are to report to duty on September 15, 1987 at 1930 hours.

This action being taken by me should not be interpreted by you as an indication that the Company condones your conduct. You are hereby warned that any further instance of failure to perform your duties in a responsible manner will result in consideration of more severe disciplinary action to include discharge.

Very truly yours,

/s/ Howard E. Ogden
Howard E. Ogden
Vice President
Maintenance And Engineering

cc: Personnel
Norman Matsuzaki

EXHIBIT A

(LOGO)

HAWAIIAN
AIRLINES

September 14, 1987

Mr. Samson Po'omahealani
IAMAW District Lodge 141
1449 South Beretania Street
Honolulu, HI 96814

Re: 3rd Step Grievance Hearings
Enos, Palmer and Otaguru

Dear Sam:

This is to follow up on your conversation today with Mary Ellen Sorensen pertaining to subject grievance hearings.

First, please be advised that Grant Norris has been reinstated, which negates the need for a hearing at the third step. Second, October 5, 1987 is agreeable to me for scheduling the third step hearings for Gordon Palmer, Steven Otaguru and Fred Enos. It is my understanding that the Palmer/Otaguru grievances will be heard at 10:00 am with the Enos hearing to follow (at approximately 11:00 am).

In the event HAL does not have a new Director of Industrial Relations on board, we may want to request a delay as none of these cases involves a discharge.

In any case, all hearings will take place in the HAL conference room at 1164 Bishop Street, Suite 800. Your kokua is appreciated.

Sincerely,

/s/ Stephen R. Thompkins
Stephen R. Thompkins
Vice President-Administration
and Counsel

cc: D. Glover
B. Perry
G. Fleming

EXHIBIT A

IAM MECHANICS AGREEMENT

ARTICLE XV - GRIEVANCE PROCEDURE (Continued)

E. Necessary hearings and investigations called by the Company shall, insofar as possible, be conducted during regular business hours, and stewards and Local Committeemen and necessary witnesses shall not suffer loss of normal pay while attending such hearings or investigation.

F. 1. No employee covered by this Agreement shall be discharged or suspended without pay from the service without a prompt, fair and impartial hearing and may be represented and assisted at such hearing by Union representatives. A member of the Local Committee will be notified within two (2) hours from the time an employee is held out of service of the reason for such action. Within forty-eight (48) hours (excluding Saturdays, Sundays and holidays) after such verbal notification, the Union and the employee will be advised in writing of the exact charges against the employee. No later than five (5) days after the employee receives the formal written charges against him, a hearing, as noted above, will be held at a place designated by the Company at a mutually agreed date and time to determine final disciplinary action.

2. An employee who is to be questioned by Company representatives in the investigation of an incident which may result in disciplinary action being taken against him may request a Union representative to be present as an observer. The above does not apply to

inquiries of employees by supervisors in the normal course of their work.

G. An employee dissatisfied with the action of the Company in disqualifying, suspending or discharging him may appeal from such action by filing an appeal to the second step of the grievance procedure as provided for in this Agreement, and a hearing shall be held within five (5) days of submitting such appeal. Oral and written evidence may be introduced at such hearings, and witnesses may be required to testify under oath. All decisions by Company representatives and all appeals filed by the employee or Union shall be in writing and shall conform to the time limitations set forth in the second step of the grievance procedure.

H. If as a result of any hearing or appeals therefrom it is found the suspension or discharge was not justified, the employee shall be reinstated without loss of seniority and made whole for any loss of pay he suffered by reason of his suspension or discharge, and his personnel records shall be corrected and cleared of such charge. If a suspension rather than discharge results, the employee shall have that time he has been held out of service without pay credited against his period of suspension. In determining the amount of back wages due an employee who is reinstated as a result of the procedures outlined in this Agreement, the maximum liability of the Company shall be limited to the amount of normal wages he would have earned in the service of the Company had he not been discharged or suspended.

* * *

EXHIBIT A

ACT 267

H.B. NO. 5

A Bill for an Act Relating to the Whistleblowers' Protection Act. *Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER WHISTLEBLOWERS' PROTECTION ACT

§ -1 Definitions. As used in this chapter:

"Employee" means a person who performs a service for wages or other remuneration under a contract for hire, written or oral, express or implied. Employee includes a person employed by the State or a political subdivision of the State.

"Employer" means a person who has one or more employees. Employer includes an agent of an employer or of the State or a political subdivision of the State.

"Person" means an individual, sole proprietorship, partnership, corporation, association, or any other legal entity.

"Public body" means:

- (1) A state officer, employee, agency, department, division, bureau, board, commission, committee, council, authority, or other body in the executive branch of state government;

- (2) An agency, board, commission, committee, council, member, or employee of the legislative branch of the state government;
- (3) A county, city, intercounty, intercity, or regional governing body, a council, special district, or municipal corporation, or a board, department, commission, committee, council, agency, or any member or employee thereof;
- (4) Any other body which is created by state or local authority, or which is primarily funded by or through state or local authority, or any member or employee of that body;
- (5) A law enforcement agency or any member or employee of a law enforcement agency; or
- (6) The judiciary and any member or employee of the judiciary.

§ -2 Discharge of, threats to, or discrimination against employee for reporting violations of law. An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

- (1) The employee, or a person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false; or
- (2) An employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

§ -3 Civil actions for injunctive relief or damages.

(a) A person who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief, or actual damages, or both within ninety days after the occurrence of the alleged violation of this chapter.

(b) An action commenced pursuant to subsection (a) may be brought in the circuit court for the circuit where the alleged violation occurred, where the complainant resides, or where the person against whom the civil complaint is filed resides or has a principal place of business.

(c) As used in subsection (a), "damages" means damages for injury or loss caused by each violation of this chapter, including reasonable attorney fees.

§ -4 Remedies ordered by court. A court, in rendering a judgment in an action brought pursuant to this chapter, shall order, as the court considers appropriate, reinstatement of the employee, payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney's fees and witness fees, if the court determines that the award is appropriate.

§ -5 Penalties for violations. (a) A person who violates this chapter shall be fined not more than \$500 for each violation.

(b) A civil fine which is ordered pursuant to this chapter shall be deposited with the director of finance to the credit of the general fund of the State.

§ -6 Collective bargaining and confidentiality rights, takes precedence. (a) This chapter shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement, nor to permit disclosures which would diminish or impair the rights of any person to the continued protection of confidentiality of communications where statute or common law provides such protection.

(b) Where a collective bargaining agreement provides an employee rights and remedies superior to the rights and remedies provided herein, contractual rights shall supersede and take precedence over the rights, remedies, and procedures provided in this chapter. Where a collective bargaining agreement provides inferior rights and remedies to those provided in this chapter, the provisions of this chapter shall supersede and take precedence over the rights, remedies, and procedures provided in collective bargaining agreements.

§ -7 Compensation for employee participation in investigation, hearing or inquiry. This chapter shall not be construed to require an employer to compensate an employee for participation in an investigation, hearing, or inquiry held by a public body in accordance with section -2 of this chapter.

§ -8 Notices of employee protections and obligations. An employer shall post notices and use other appropriate means to keep the employer's employees informed of their protections and obligations under this chapter.

§ -9 conflict with common law, precedence. The rights created herein shall not be construed to limit the

development of the common law nor to preempt the common law rights and remedies on the subject matter of discharges which are contrary to public policy. In the event of a conflict between the terms and provisions of this chapter and any other law on the subject the more beneficial provisions favoring the employee shall prevail."

SECTION 2. If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 3. This act shall take effect upon its approval.

(Approved June 24, 1987.)

EXHIBIT B

In the Matter of The Arbitration)	
between INTERNATIONAL)	
ASSOCIATION OF MACHINIST)	
AND AEROSPACE WORKERS on)	
behalf of DANA FELLER,	)	IAM Grievance
	)	No.
Grievant,	)	M87-0003
)	
vs.)	
)	
HAWAIIAN AIRLINES)	
INCORPORATED,)	
)	
Employer,)	
)	

The above-entitled matter came on for hearing at 1164 Bishop Street, 8th Floor, Honolulu, Hawaii, commencing at 9:10 a.m., on Wednesday, December 30, 1987.

BEFORE:

CHARLES R. BOCKEN, ARBITRATOR

APPEARANCES:

For the Grievant:	SAMSON POOMAIHEALANI International Association of Machinists and Aerospace Workers District Lodge 141 1449 South Beretania Street Honolulu, Hawaii 96814
For the Employer:	STEPHEN R. THOMPCKINS, ESQ. Hawaiian Airlines P. O. Box 30008 Honolulu, Hawaii 96820

* * *

[p. 99] A When you finish job, you sign off the paperwork concerning that particular aircraft and you go home.

Q Do you know who Justin Culahara is?

A Yes, sir.

Q Could identity [sic] him?

A Blue shirt.

MR. POOMAIHEALANI: The record should show that he recognized who Mr. Culahara is.

Q Has he forced you to work overtime?

A Yes, sir.

Q And on each occasion when you were forced, you did comply with that demand?

A Yes, sir, I did.

Q During your employment with Hawaiian, while you were under the jurisdiction of Mr. Culahara, have you witnessed or have you personally been threatened by him?

A Yes, sir.

MR. THOMPCKINS: I'll object. I still don't see the relevance in this line of questioning.

THE ARBITRATOR: I'll let it go. Go ahead, you can answer the question.

Q (By Mr. Poomaihealani) What was the threat?

A On the morning that Mr. Norris was suspended for -

MR. THOMPCKINS: Object. Can you talk about the time frame? Can you tell us when specifically?

[p. 100] THE WITNESS: Like dates? July 15.

MR. THOMPCKINS: What year?

THE WITNESS: '87.

MR. THOMPCKINS: I'll object to that. There's simply no bearing to any matters which occurred in April of this year pertaining to the grievant in this case.

THE ARBITRATOR: Well, I guess he raised the issue and whether it has merit or not, he raised the issue that he was fearful of going back and was apprehensive about going back as a result of the call on the telephone, because of the angry tone.

I'll let it continue for a little while.

Go ahead. You may answer.

Q (By Mr. Poomaihealani) What transpired in that incident?

A On July 15th?

Q Yes.

A Well, when Mr. Norris had refused to sign off a work form because he felt that the aircraft was unsafe, Mr. Culahara suspended him for insubordination because of his refusal to sign. And a few moments after Norris had left the premises, Mr. Culahara came to me and said, "You see what I just did to Norris? I'll do the same if you do not sign."

And I was apprehensive. I didn't want to sign it [p. 101] myself because that sleeve was damaged way

beyond tolerances and I didn't want to sign it because, like I said, I felt it was unsafe, and being on my 90-day probation, I figured I didn't have any right of any kind. So then before I agreed to sign it, Mr. Culahara said he would put his employee number on the form next to mine.

So then I agreed then to put my signature or my employee number, excuse me, on the form. And then about a month and a half later, I guess, I got a letter from the FAA saying they were investigating me - I mean investigating a violation done by me signing off a form that wasn't, you know - they said that it was unairworthy. And they were wanting to know why I signed off this form when I knew that the aircraft was unsafe.

And I told them -

MR. THOMPCKINS: I'm going to have to interject. Again, we're talking about threats involving personal safety and I see none of that here. He's talking about requirements and performing work instructions provided by the Company. And it has no relevance whatsoever on Mr. Feller's decision to stay at home and not wanting to come back to work. There's no relevance.

THE ARBITRATOR: I see what you -

MR. THOMPCKINS: Absolutely no relevance.

THE ARBITRATOR: But I understand.

[p. 102] So we can stop this line of questioning.

MR. POOMAIHEALANI: No further questions.

THE ARBITRATOR: All right, thank you.

MR. POOMAIHEALANI: We have nothing further to add. No witnesses.

MR. THOMPkins: We have no further witnesses.

THE ARBITRATOR: You don't want to have any rebuttal?

MR. THOMPkins: Well, I'd like to have a short recess.

THE ARBITRATOR: Sure, fine.

(A recess was taken.)

MR. POOMAIHEALANI: I forgot to submit into evidence, Mr. Bocken, a packet of some background on the character of the grievant. And it contains an honorable discharge from the United States Air Force; a certificate of training from the Air Force for Course 7, motorcycle challenges; an honorable discharge from the United States Coast Guard as a Boatswain's Mate, Second Class; a Certificate of training from the United States Coast Guard for Boatswain's Mate Third Class. A certificate of training from the Coast Guard for Boatswain's Mate Third Class.

A University of Hawaii associate's degree, good conduct award from the United States Coast Guard, an Order of the Arrow from the Eagle Scout, and a citation as a Pro

* * *

STATE OF HAWAII) ss.
)
CITY AND COUNTY OF HONOLULU)

I, Jeanne O. Sumida, Notary Public, State of Hawaii, do hereby certify:

That I was acting as shorthand reporter in the foregoing matter on December 30, 1987.

That the foregoing proceedings were taken down in machine shorthand by me to the best of my ability at the time and place stated herein, and were thereafter reduced to typewriting under my supervision;

That the foregoing is a true and correct transcript of the proceedings had in the foregoing matter and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that I am not attorney for any of the parties hereto, nor in any way interested in the outcome of the cause named in the caption.

Dated at Honolulu, Hawaii, this 14th day of January, 1988.

/s/ Jeanne O. Sumida
NOTARY PUBLIC, STATE OF
HAWAII

My Commission expires
November 4, 1988.

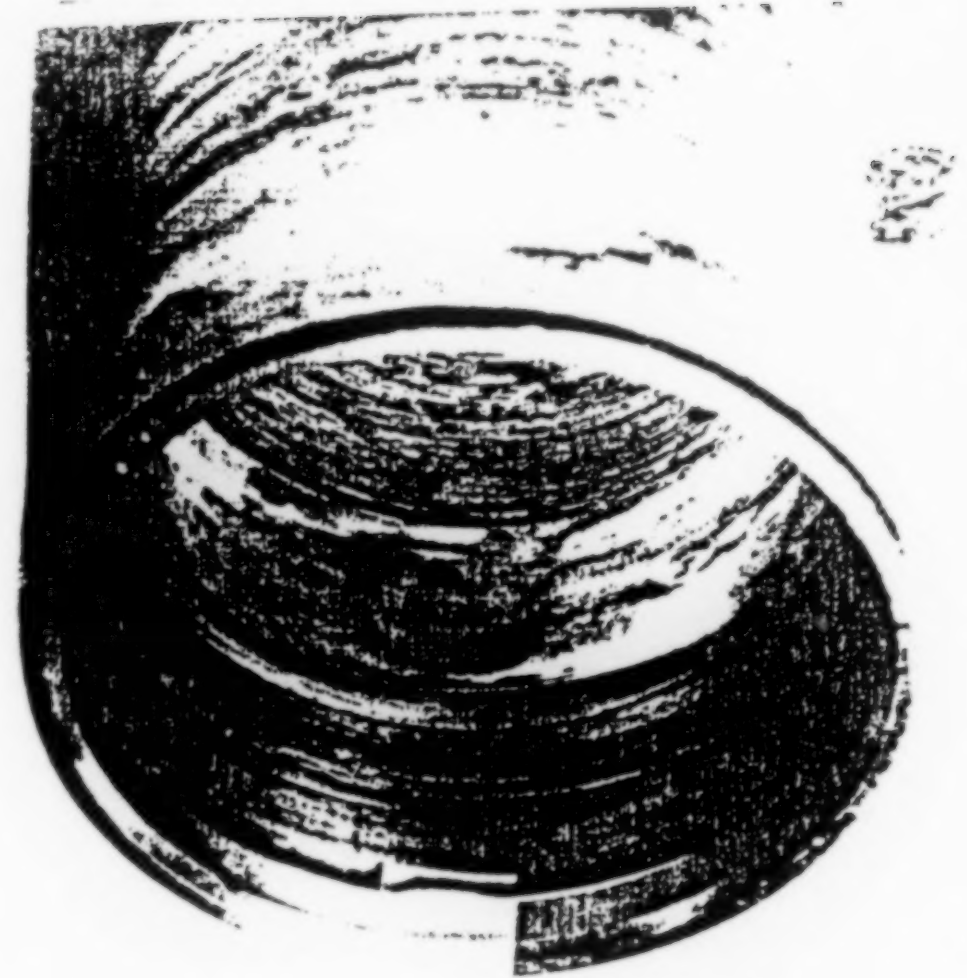
116

EXHIBIT C-1



117

EXHIBIT C-2



118

EXHIBIT C-3



119

EXHIBIT C-4



EXHIBIT D

[LOGO]

Western Pacific Region

US Department
of Transportation
Federal Aviation
Administration

PO Box 92007
Worldway Postal Center
Los Angeles CA 90009

Case No. 87WP130109

MAR 02 1988

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Hawaiian Airlines, Inc.
1164 Bishop Street, 8th Floor
Honolulu, Hawaii 96813

Dear Sirs:

We have received a report of investigation from which it appears that your company, the holder of Air Carrier Operating Certificate No. 5, violated the Federal Aviation Regulations, as indicated below.

On May 27, 1987, your company's personnel performed maintenance on a Douglas DC-9-51 aircraft, Registration No. N709HA, by replacing the wheel, brake and bearing assemblies on the No. 2 main landing gear wheel. During the maintenance, your company's mechanics reported to their supervisor that the axle spacer (sleeve) assembly was damaged. They were directed by the Line Maintenance Manager to replace the wheel, brake, and bearing assemblies but not to replace the damaged sleeve assembly since a separate discrepancy report would be made. No such report was made, and the aircraft was returned to service without replacement of the sleeve assembly.

On June 12, 1987, the No. 2 wheel and bearing assemblies were replaced but the sleeve assembly was not replaced or repaired.

On July 4, 1987, the No. 2 tire and bearing assemblies were replaced but the sleeve assembly was not replaced or repaired.

On July 15, 1987, the No. 2 tire assembly was replaced but the sleeve assembly was not repaired or replaced. The mechanic who performed the tire assembly replacement refused to sign off the work performed because of the damaged sleeve assembly. He was directed by your company's management personnel to do so but refused to comply. He was subsequently terminated from employment from your company for insubordination.

On July 23, 1987, the No. 2 tire and bearing assemblies were replaced but the sleeve assembly was not replaced or repaired.

On July 31, 1987, the No. 2 brake and bearing assemblies were replaced but the sleeve assembly was not repaired or replaced.

The damaged sleeve assembly was finally replaced on August 4, 1987. On that date, an FAA Inspector inspected the damaged sleeve assembly and found it to be in the following condition:

1. The spacer was badly scored.
2. The center area of the spacer appeared to have been hit numerous times with a heavy metal object.
3. There were 4 or 5 deep gouges on the spacer.

4. The overall damage was beyond allowable repair limits set out in the manufacturer's maintenance manual.

Between May 27, 1987 and August 4, 1987, your company operated Aircraft N709HA with the damaged sleeve for 65 days and on 958 flights.

The operation of the aircraft with the damaged sleeve made the aircraft unairworthy. Moreover, the aircraft was at least potentially unsafe because of the potential of hazard of the No. 2 wheel seizing or falling off during takeoffs and landings.

Based on this information, it appears that you company violated Sections 121.153(a)(2) and 43.13 of the Federal Aviation Regulations and is subject to a civil penalty under Section 901(a) of the Federal Aviation Act of 1958, as amended, in an amount not to exceed \$1,000.00 for each such violation.

Upon consideration of all the facts and circumstances contained in the report, we would be unwilling to settle this case for any sum less than \$964,000.00. In order to give your company an opportunity to submit such an offer in compromise, we will take no further action for a period of fifteen (15) days subsequent to your receipt of this letter.

The enclosed statement explains the procedure followed in cases of this type.

Sincerely,

/s/ DeWitte T. Lawson, Jr.
DeWITTE T. LAWSON, JR.
Regional Counsel

Enclosure

FEDERAL AVIATION ADMINISTRATION
INFORMATION REGARDING CIVIL PENALTIES
UNDER THE FEDERAL AVIATION ACT OF 1958

Section 901(a) of the Federal Aviation Act of 1958 provides that any person who violates pertinent provisions of the Act, or any rule, regulation or order issued thereunder, shall be subject to a civil penalty of not to exceed \$1,000.00 for each violation. However, the Act authorizes the Administrator to compromise such penalties. The attached letter states the sum which we would accept in full settlement of the alleged violation or violations therein. If you prefer to settle this matter on the basis of the compromise suggested in the attached letter, *such a settlement will not constitute an admission of guilt.*

You are, of course, not required to make an offer of settlement. If you do not wish to make such an offer, the matter will be presented to a United States Attorney, who may bring a civil action, seeking a civil penalty in the full amount of \$1,000.00 for each alleged violation. The United States District Court will decide all issues of fact and law, following a trial at which you will have the right to present evidence on your behalf and cross-examine the Administrator's witnesses.

You may, therefore, within fifteen (15) days from the receipt of this letter, proceed in one of the following ways:

1. You may submit the amount suggested in the attached letter by *certified check or money order*, payable to the *Federal Aviation Administration*.

2. You may submit additional information which you believe will either explain, excuse, or disprove the alleged violations. You may do so in writing or in person by requesting an informal conference at the Office of the Regional Counsel. Any additional information submitted by you will be given our careful consideration. Since the attached letter may become a part of the public docket, you may wish to submit a statement which would be included in the public docket. Statements or letters submitted by you will be included in the public docket only if you specifically request that they be so included; or
3. You may wish to have the issues of fact and law in this matter decided by the United States District Court. If so, please advise us immediately.

All correspondence in this matter should be addressed to:

Regional Counsel
Federal Aviation Administration
Post Office Box 92007, Worldway Postal Center
Los Angeles, California 90009
Telephone: (213) 297-1270

EXHIBIT E

[LOGO]

Western-Pacific Region

US Department
of Transportation
Federal Aviation
Administration

PO Box 92007
Worldway Postal Center
Los Angeles CA 90009

Case No. 87WP130101

FEB 25 1988

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

TO: JUSTIN TONY CULAHARA
2365 Apoepoe Street
Pearl City, Hawaii 96782

NOTICE OF PROPOSED CERTIFICATE ACTION

Notice is hereby given that, upon consideration of our report of investigation, it appears that:

1. You are now, and at all times mentioned herein were, the holder of Mechanic Certificate No. 1561742.
2. At all times mentioned herein you were the Line Maintenance Manager for Hawaiian Airlines, Inc. at its main maintenance base at Honolulu, Hawaii.
3. On or about July 15, 1987, Hawaiian Airlines' maintenance personnel, Mr. John Daniels, Mr. Grant Scott, and Mr. Thomas C. Sealy, performed maintenance on a Hawaiian Airlines' Douglas DC-9-51 aircraft, Registration No. N709HA, by replacing the No. 2 main landing gear wheel tire.

4. During this maintenance, the maintenance personnel discovered that the No. 2 MLG axle spacer (sleeve) was damaged and needed to be replaced.
5. The replacement of the sleeve was discussed with you, you inspected the sleeve, and you decided that it did not need to be replaced.
6. You advised the maintenance personnel not to change the sleeve but to hurry up and change the tire since the aircraft was needed for service.
7. The maintenance personnel commenced to test the condition of the sleeve, using a dye test.
8. You ordered the dye test to be discontinued, and you stated that the aircraft was needed to be moved right away to the terminal for service.
9. Mr. Norris refused to sign off the aircraft maintenance records because of the condition of the sleeve.
10. You then terminated his employment with Hawaiian Airlines.
11. You then threatened Mr. Sealy with terminating his employment if he did not sign the maintenance records.
12. You then initialed off on Hawaiian Airlines' Form 46 clearing the discrepancy, and returning the aircraft to service.
13. No maintenance was performed to repair or replace the damaged sleeve.

14. The damaged sleeve made the aircraft unairworthy.

By reason of the foregoing circumstances, you

- a. violated Section 43.13(a) of the Federal Aviation Regulations, in that you performed maintenance and failed to use methods, techniques, and practices acceptable to the Administrator;
- b. violated Section 43.13(b) of the Federal Aviation Regulations, in that you performed maintenance and failed to do the work in such a manner and to use materials of such a quality that the condition of the aircraft was at least equal to its original or properly-altered condition;
- c. failed to exercise the degree of care, judgment and responsibility required of the holder of a mechanic certificate; and
- d. have demonstrated that you presently lack the qualifications required of the holder of a mechanic certificate.

THEREFORE, please take notice that, by reason of the foregoing circumstances, and pursuant to the authority vested in the Administrator of the Federal Aviation Administration by Section 609 of the Federal Aviation Act of 1958, as amended, we propose to revoke Mechanic Certificate No. 1561742 and any other mechanic certificate held by you and to order that no application for a new mechanic certificate be accepted from you, and that no mechanic certificate be issued to you, without prior written authorization for such action being given on behalf of the Administrator.

Unless, within fifteen days of the date of service of this Notice, we receive, in writing, your choice of the alternatives provided and set forth on the enclosed form, an Order revoking your certificate as proposed above will be issued.

This Notice does NOT revoke your certificate; however, if you wish to begin the revocation immediately, you must physically surrender your certificate to this office as provided in Option 1 of the enclosed information sheet.

DeWITTE T. LAWSON, JR.
Regional Counsel

By: Matthew Z. Markotic
Matthew Z. Markotic
Attorney

Enclosure

FORM FOR USE IN RESPONDING NOTICE

DATE _____

Federal Aviation Administration
Regional Counsel, AWP-7
P. O. Box 92007, Worldway Postal Center
Los Angeles, CA 90009

CASE NO. 87WP130101 (7.3)

In reply to your Notice of Proposed Certificate Action I elect to proceed as indicated below:

1. ☐ I hereby transmit my certificate with the understanding that an Order will be

issued as proposed effective the date of mailing of this reply; or

2. ☐ I request that the Order be issued so that I may appeal directly to the National Transportation Safety Board; or
3. ☐ I hereby submit my answer to your Notice and request that my answer and any information attached thereto be considered in connection with the allegations set forth in your Notice and your disposition of the case; or
4. ☐ I hereby request the opportunity to discuss this matter informally with a Federal Aviation Administration attorney located at 15000 Aviation Boulevard, Lawndale, California 90261. (Telephone No. 213-297-1271).

Signature _____
JUSTIN TONY CULAHARA

Home Address _____

Home Telephone _____

Business Address _____

Business Telephone _____

WP Form 2150-2 (9-85) (Obsoletes Previous Edition)

Aviation Safety Reporting Program
(Certificate Action)

If you have filed an Aviation Safety Report with the National Aeronautics and Space Administration (NASA) concerning the incident set forth in the attached Notice of Proposed Certificate Action, you may be entitled to waiver of any penalty. If you claim entitlement to this waiver, you must present evidence with your response satisfactory to the Administrator that you filed a report with NASA within 10 days of the incident. The date stamped receipt you have received from NASA is proof of the filing of the report. You moreover will only be entitled to waiver if it is found:

- A. That this alleged violation was inadvertent and not deliberate; and
- B. That this violation did not involve a criminal offense, or accident, or discloses a lack of competence or qualification to be the holder of a certificate; and
- C. You have not paid a civil penalty pursuant to Section 901 of the Federal Aviation Act or been found in any prior FAA enforcement action to have committed a violation of the Federal Aviation Act or any regulation of the Federal Aviation Act since April 30, 1975.

In the event that you prove your entitlement to this waiver of penalty, an Order will be issued finding you in violation but imposing no certificate suspension. Your claim of entitlement to waiver of penalty shall constitute your agreement that this Order may be issued without further notice. You will, however, have the right to appeal

the Order to the National Transportation Safety Board pursuant to Section 609 of the Federal Aviation Act.

Office of Regional Counsel, AWP-7
Federal Aviation Administration
P. O. Box 92007
Worldway Postal Center
Los Angeles, California 90009-2007

EXHIBIT F

[Taken from]

Honolulu Star-Bulletin

Thursday, May 12, 1988

Big fines levied on Hawaiian Air

FAA safety penalty of \$1.169 million is being contested

By Russ Lynch
Star-Bulletin

Hawaiian Airlines has been assessed fines totalling \$1,169,000 for alleged safety violations dating back to the fall of 1984, the Federal Aviation Administration said today.

Hawaiian said today it has advised the FAA that it "denies any allegations of failure to comply with the federal aviation regulations and is contesting the allegations before the FAA."

An FAA spokesman in Washington said the "vast bulk" of the amount levied against Hawaiian Airlines, \$964,000, related to events last year when mechanics repeatedly reported a damaged axle sleeve on a DC 9 jet to supervisors but allegedly were ordered not to replace it.

The mechanics replaced the wheel bearing assembly but did not repair the axle sleeve, which appeared to have been hit several times by a heavy metal object, the FAA charged. A mechanic was fired for insubordination after he refused to sign off on the work, the FAA said in its letter to the airline.

FAA inspectors finally saw the trouble themselves and ruled that the damage was beyond allowed limits, said FAA public affairs officer Fred Farrar.

The airline was fined \$1,000 for each of 958 times it flew the DC 9 in the allegedly damaged condition, plus a further fine.

In a statement issued late this morning, Hawaiian said it had received a letter from the FAA "proposing to assess a civil penalty for certain alleged violations of the FAA regulations" that occurred in the first half of last year.

Hawaiian Air said that since the matter is being contested, it will not comment on the substance of the FAA claims.

Another FAA spokesman said the total fine comes from five separate civil penalty letters, starting with a small fine of \$3,000 assessed on Sept. 25, 1984, and ending with a letter in March this year.

A former Hawaiian Airlines mechanic, Grant T. Norris, sued the airline in December saying he was wrongfully dismissed for refusing to sign off for the work he did on the DC-9's axle equipment.

Details of the other complaints were not immediately available.

The interisland carrier was second on a list of 15 airlines ranked according to the total amount of fines the FAA says it is owed. United Airlines was at the top of the list with \$1,262,100.

Next after Hawaiian was Continental Airlines, with \$962,130 owed, and the list tapered down to 15th ranked Alaska Airlines, which owes \$1,000, the FAA said.

FAA spokesmen explained how the civil penalty system works. After FAA inspectors detect what they believe is a security or maintenance lapse, a letter goes to the airline detailing the charge and assessing a fine.

"They have several recourses. They can concur and pay the fine. They can request a formal meeting with the FAA to talk about the alleged violation and negotiate a fine, or they can ask a judge to rule whether it is a valid fine," Callseo said.

He said the FAA gave the Wall Street Journal and the Washington Post a list of civil penalty letters that are currently pending, in response to requests.

United said comment in inappropriate while the airline is having discussions with the FAA over the penalties.

FAA fines outstanding

The airlines with the most pending fines for allegedly violating federal air-safety and security rules:

United	\$1,262,100
Hawaiian	\$1,169,000
Continental	\$982,130
Eastern	\$893,000
Braniff	\$518,000
American	\$421,250
Northwest	\$371,000
Pan Am	\$264,500
USAir	\$166,100
Delta	\$147,250

EXHIBIT G

UNITED STATES OF AMERICA DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION

In the Matter of the Investigation)
of Hawaiian Airlines, Inc.)

ORDER OF INVESTIGATION

On Friday, September 18, 1987, the Federal Aviation Administration notified Hawaiian Airlines, the holder of Air Carrier Operating Certificate No. 5, that, pursuant to Section 609(a) of the Federal Aviation Act of 1958, as amended, the agency intended to conduct airworthiness inspections of the main landing gear wheel assemblies of Douglas DC-9-51 Civil Aircraft N689HA and N699HA. These inspections were to be conducted on Monday, September 21, 1987.

Between September 18 and 20, 1987, Hawaiian Airlines, Inc., performed maintenance on said Douglas DC-9-51 aircraft, by inspecting and replacing the main landing gear axle spacers (sleeves). On September 19, 1988, this agency's Inspector Thomas T. Murata visited Hawaiian Airline's maintenance base and requested Hawaiian Airlines' personnel to make the sleeves removed from the two aircraft available to him for inspection. The sleeves, however, were not made available to him. Subsequently, Hawaiian Airlines informed the Federal Aviation Administration that the 6 or 8 sleeves, which had been removed from the two aircraft,

were allegedly misplaced or lost while in the custody of Hawaiian Airlines.

The Federal Aviation Administration subsequently received information that the removed sleeves, or at least some of them, had been damaged beyond the manufacturer's limits and were therefore, unairworthy.

In order to ascertain the circumstances of the maintenance performed by Hawaiian Airlines, as described above, the condition of the removed sleeves, and the circumstances of the alleged misplacement or loss of the removed sleeves, and thus to determine whether and to what extent Hawaiian Airlines and any of its employees may have violated Sections 43.13 or 121.153(a)(2) of the Federal Aviation Regulations or any other regulation or statute, the Administrator of the Federal Aviation Administration, acting by and through his Regional Counsel, Western-Pacific Region, hereby orders that:

- (1) Pursuant to authority in Sections 313, 609, and 1004 of the Federal Aviation Act of 1958, as amended, (49 U.S.C. 1354, 1429 and 1484), and Part 13 of the Federal Aviation Regulations (14 C.F.R. Part 13), an investigation be conducted in order to determine the facts and circumstances as described above.
- (2) Frederick C. Woodruff is hereby designated to serve as Presiding Officer and he is delegated the authority to conduct said investigation. He may be assisted by persons he designates, and he shall have the authority pursuant to Sections 313 and 1004 of the Federal Aviation Act of 1958, as amended, to take testimony, issue subpoenas, take

depositions, administer oaths, examine witnesses, and such other authority as is contained in Section 1004 of the Federal Aviation Act of 1958, as amended.

- (3) The investigation shall be conducted pursuant to procedures in Subpart F of FAR Part 13. At any hearing or deposition convened by Frederick C. Woodruff pursuant to this Order, he shall have full authority as Presiding Officer and he may be assisted by such persons as he designates. A verbatim record of any hearings or depositions will be kept. Documents produced at such hearings or depositions pursuant to a subpoena issued by Frederick C. Woodruff shall be made a part of the record of such hearings or depositions when so ordered by him as Presiding Officer.

DATED: April 13, 1988

/s/ DeWitte T. Lawson, Jr.
DeWITTE T. LAWSON, JR.
Regional Counsel

EXHIBIT H
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GRANT T. NORRIS,	)	Civil No.
	)	88-00010 HMF
Plaintiff,)	
	)	<u>MEMORANDUM</u>
vs.	)	<u>AND ORDER</u>
)	
HAWAIIAN AIRLINES, INC.,	)	(Filed,
a Hawaii corporation,	)	Mar. 28, 1988)
)	
Defendants.)	
)	

Grant Norris (Norris), an airline mechanic formerly employed by Hawaiian Airlines, Inc. (HAL), brought an action against HAL in Hawaii state court for wrongful termination. Norris pled five counts: Count I alleged that Norris was discharged in violation of public policy as expressed in Federal Aviation Act and regulations; Count II alleged a violation of the Hawaii Whistleblowers Protection Act, a state statute that purports to protect employees against retaliatory firings; Count III alleged that Norris had suffered emotional distress as the result of HAL's actions; Count IV sought punitive damages from HAL for allegedly outrageous conduct; and Count V stated a claim for breach of the collective bargaining agreement. HAL removed Norris's action to this court asserting that Norris's state law claims were preempted by federal labor law. Norris has moved to remand, arguing that his claims are not preempted and the federal court is without jurisdiction. HAL opposes the motion and has moved for summary judgment on the grounds that Norris's claims are preempted by federal law and

must be dismissed for failure to exhaust the grievance procedures established by the collective bargaining agreement.

I. FACTUAL BACKGROUND

Norris was employed by HAL as an FAA licensed aircraft mechanic from February 2, 1987 to August 3, 1987. *See* Norris Affidavit, attached to Motion to Remand [hereinafter Norris Aff.] Norris's FAA license carried an Airframe and Powerplant rating which gives the mechanic so rated the authority to approve and return to service an aircraft after the mechanic has made, supervised, or inspected certain repairs performed on the aircraft. *See* 14 C.F.R. §§ 65.85, 65.87 (1987). However, the mechanic may not approve for service any aircraft or part to which repairs have been made that do not conform to the applicable FAA regulations, and any fraudulent entry in any record or report required by the FAA regulations is cause for suspending or revoking the mechanic's FAA license. 14 C.F.R. § 43.12 (1987).

On July 14, 1987, Norris was servicing one of HAL's aircraft and noticed that one of the tires was worn. When the tire was removed Norris discovered that the axle sleeve, which normally has a mirror smooth surface, was scarred and pitted. Such damage to the surface of an axle sleeve can cause the sleeve to rub against the wheel bearing. The heat generated by this friction, combined with the high speed at which the wheel bearing spins on landing, can result in the bearing fusing to the sleeve and the ultimate failure of the landing gear. Norris Aff. at paragraphs 5-10. Norris believed the part was unsafe and

should be replaced, but his supervisor instead ordered the mechanics to hand sand the axle sleeve and put over it a new bearing and tire. *Id.* at paragraphs 11-13. Later the supervisor asked Norris to sign the maintenance record for installation of the tire, but Norris refused to sign unless the supervisor "could show me in the maintenance manual where it said that the axle [sleeve] was in a satisfactory condition." The supervisor did not consult the manual and told Norris that if he did not sign he would be suspended. Norris did not sign and was suspended. The next day he called the FAA and told them that there was a problem with the HAL aircraft he had serviced. *Id.* at paragraphs 15-21.

A termination hearing was held pursuant to Article XV of the collective bargaining agreement and Norris was discharged for insubordination. *See generally* Agreement Between Hawaiian Airlines, Inc. and the International Association of Machinists and Aerospace Workers (AFL-CIO), attached as Exhibit 1 to Motion for Summary Judgment [hereinafter Agreement or collective bargaining agreement]. Norris then filed a grievance regarding his termination and Norris's union representative referred the grievance for a Step 3 hearing pursuant to the Agreement. However, before the Step 3 hearing commenced, HAL issued a letter dated September 10, 1987, mitigating Norris's punishment from termination to a suspension without pay. Exhibit 3 to Motion to Remand. HAL then wrote to the union representative stating HAL's position that since Norris's punishment had been mitigated there was no need for the Step 3 hearing. *Id.*, Exhibit 4. Norris did not respond to HAL's September 10 letter and instead

filed this action in state court. The Step 3 grievance hearing was not held.

II. JURISDICTION

A. Removal Jurisdiction

I conclude at the outset that even if Counts I through IV of Norris's complaint are not preempted by federal labor law, Count V, which states a claim for breach of the collective bargaining agreement, clearly is a claim arising under federal law over which this court have removal jurisdiction. The terms and conditions of Norris's employment with HAL are governed by the collective bargaining agreement, as Norris concedes in Count V of his complaint. The Railway Labor Act (RLA), 45 U.S.C. §§ 151-185 governs labor relationships in the airline industry. *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 685 (1963); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983); *Fechtelkott v. Air Line Pilots Ass'n*, 693 F.2d 899, 902-03 (9th Cir. 1982). A claim for breach of an agreement governed by the RLA arises under federal law. *See, Scott v. Machinists Automotive Trades, District Lodge No. 190*, 827 F.2d 589, 591 (9th Cir. 1987) (claim under § 301 of the LMRA for breach of the collective bargaining agreement removable as a federal question); *Schroeder, supra*, at 191 (claims based on conduct not authorized by a collective bargaining agreement governed by the RLA arose under federal law and removable). Finally, this federal question "is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987).

Since federal jurisdiction at least over Count V exists, HAL could properly remove the entire action. *Lepucki v. Van Wormer*, 765 F.2d 86 (7th Cir. 1985), *cert. denied*, 474 U.S. 827 (1985); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1430 (9th Cir. 1984). Once an action has been properly removed on the basis of a federal claim, the district court may exercise jurisdiction over pendant state claims even if the federal claim has been dismissed,¹ or it may, in its discretion, remand the state claims to state court. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 622 (1988); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966); *Salveson*, *id.* In this case, however, HAL urges that Counts I through IV are completely preempted by federal labor law and thus are not pendant state claims subject to the court's discretion to remand.² If Norris's claims are completely preempted there are no

¹ In its motion for summary judgment, discussed *infra*, HAL argues that Count V, as well as Counts I through IV which it believes preempted, must be dismissed for Norris's failure to exhaust the grievance procedures of the collective bargaining agreement.

² HAL argues that the preemptive force of the RLA is so extraordinary that it converts ordinary state common law claims into federal claims. HAL acknowledges that if federal preemption is asserted as a defense to state law claims, those claims are not converted into federal law claims. Norris argues that HAL is simply asserting preemption as a defense. To the extent that these arguments are addressed to the question of removability, they need not be resolved since I have concluded that the complaint was properly removed on the basis of Count V even if Counts I through IV are not preempted. However, these arguments are also pertinent to the question whether any claims can be remanded to state court. See *Price v. PSA, Inc.*, 829 F.2d 871, 875 (9th Cir. 1987). They are therefore discussed *infra*.

state claims to be remanded to state court. *Price v. PSA, Inc.*, 829 F.2d 871, 875 (9th Cir. 1987) (if state law claims are completely preempted by RLA, district court has no discretion to remand claims to state court). If, on the other hand, Norris's claims are not completely preempted then this court has no jurisdiction, other than pendant, over those claims and they may be remanded to state court if appropriate. See, *Carnegie-Mellon*, *supra*, 108 S.Ct. at 622 (court has discretion to remand pendent [sic] state law claims). The question is thus whether Counts I through IV are preempted.

B. Preemption

In some instances the preemptive force of a federal statute will be "so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.'" *Caterpillar*, 107 S.Ct. at 2430. If an area of state law has been completely preempted, "any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* Federal labor law, especially as developed under § 301 of the Labor Management Relations Act (LMRA), is an area in which the complete preemption doctrine is often applied. *Id.*

At the outset HAL urges that the preemption analysis developed under § 301 of the LMRA is equally applicable to a case involving the RLA, citing *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1045 (7th Cir.), *cert. granted*, 108 S.Ct. 226 (1987). I have some doubt that this is so in view of the recent decision of the Ninth Circuit in *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987).

In *Price* the Ninth Circuit declined to extend the broad rule of preemption developed under § 301 of the LMRA to claims involving a collective bargaining agreement governed by the RLA. 829 F.2d at 875-76. Instead, the Court held that a state law claim is completely preempted by federal law only if Congress has "'clearly manifested an intent' to convert a state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 876. Because the RLA does not contain a civil enforcement provision, as does § 301, the Court found that "Congress has not indicated, as it did with LMRA § 301 . . . , that the RLA is 'so powerful as to displace entirely any state cause of action.'" *Id.* (quoting *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542, 1546 (1987)). The Court held:

Absent a direct expression of congressional intent to create federal jurisdiction for all causes of action within the scope of Section 2, Fourth of the RLA, we believe we must abide by the well-pleaded complaint rule. Congress or the Supreme Court can steady us if either finds our step faulty. We hold that plaintiffs' state law causes of action are not completely preempted by the RLA.

Id. at 876. The Court in *Price* conceded, however, that PSA might still argue federal preemption as a defense to the plaintiff's state law claims. *Id.* at 876.

Price involved two general claims under state law: 1) claims predicated on the violation of public policy expressed in California Labor Code §§ 922 and 923, which prohibit retaliation for union organizing activities, and 2) claims based on violation of the public policy

inherent in California Code of Civil Procedure § 1209(a)(5), which prohibits disobedience of lawful court orders. *Id.* at 872. The RLA, in § 2, Fourth, 45 U.S.C. § 152, Fourth, prohibits carriers from denying or in any way questioning the right of employees to unionize. None of the provisions of § 2 of the RLA contain a civil enforcement provision.

Price relied on two recent Supreme Court cases which considered federal preemption of state law claims. First, in *Caterpillar v. Williams*, 107 S.Ct. 2430 (1987), the Supreme Court held that state law claims for breach of individual employment contracts were not completely preempted by § 301 of the LMRA. In *Caterpillar* the Court emphasized that an employee "covered by a collective bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied on is *not* a collective bargaining agreement." *Id.* at 2431-32 (emphasis in original). The *Caterpillar* Court noted that even though the state law claims were not completely preempted so as to permit removal jurisdiction, the employer could nevertheless argue as a defense in state court that the state law claims were preempted by federal law. *Id.* at 2432. The Court stated that a claim would be preempted when "the plaintiff invokes a right created by a collective bargaining agreement," but not when the defendant merely injects the federal question as a defense to a state law claim. *Id.* at 2433.

In the second case, *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987), the Supreme Court held that an employee's state law claims for breach of contract and wrongful termination were completely preempted by

ERISA. 107 S.Ct. at 1548. The Court stated that it was deciding the question expressly left open in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), to wit: whether state law claims within the scope of ERISA's civil enforcement provision, § 502(a), 29 U.S.C. § 1132(a), were completely preempted. *Id.* at 1547. The *Metropolitan* Court found complete preemption, however, only because "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA." *Id.*

The Court noted that "[f]ederal pre-emption is ordinarily a defense to plaintiff's suit" and as such "does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to a federal court." *Id.* at 1546. In a companion case, *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987), the Court analyzed the preemptive effect of ERISA as a defense and held that state common law tort and contract claims for improper processing of a claim for benefits were preempted by ERISA. *Id.* at 1556. The *Metropolitan* court went further and found that Congress had so completely preempted the area that any civil complaint within the scope of ERISA's civil enforcement provision was necessarily federal in character and subject to removal to federal court. The Court stated:

Even with a provision such as [ERISA's civil enforcement provision] that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . , however, we would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim

for purposes of the well-pleaded complaint rule. But the language of the jurisdictional subsection of ERISA's civil enforcement provision closely parallels that of § 301 of the LMRA. . . . [The legislative history of the provision also] sets out this clear intention to make [ERISA] suits brought by participants or beneficiaries federal questions for the purposes of federal court jurisdiction in a like manner as § 301 of the LMRA.

107 S.Ct. at 1547 (citations omitted).

The Ninth Circuit in *Price* found that the RLA did not have the preemptive force of ERISA or § 301 of the LMRA because it contained no similar civil enforcement provision and revealed no clear congressional intent to "create federal jurisdiction for all causes of action within the scope of Section 2, Fourth of the RLA." 829 F.2d at 876. Although *Price* was concerned only with Section 2, Fourth of the RLA, a section not applicable to Norris's claims, I believe the rationale of *Price* applies equally to this case. Although HAL argues that the RLA preempts Norris's claims, it does not identify any particular provision of the RLA that it believes preemptive. Section 2, First and Second of the RLA arguably cover Norris's claims, but neither of these provisions has a civil enforcement provision. In sum, I conclude that under *Price* Norris's state law claims set forth in Counts I through IV of his complaint are not completely preempted by the RLA and this court therefore does not have subject matter jurisdiction

over those claims except to the extent that they are pendant to a federal claim.³

I emphasize that HAL may still have a good federal defense to Norris's state law claims. The RLA does exhibit a congressional intent that certain disputes between an employee and employer covered by the RLA be resolved only by the grievance procedures specified and not by the courts. *Atchison T & S.F. Ry. Co. v. Buell*, 107 S.Ct. 1410, 1414 (1987); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972); *Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1289-92 (9th Cir. 1986). It may be that the state courts do not have jurisdiction over Norris's claims because of the preemptive effect of the RLA's administrative grievance procedures. But such preemption is a defense which can be addressed by the state courts; it does not convert Norris's claims into federal claims for jurisdictional purposes.

I am also aware of the cases from this Circuit which have held, contrary to *Price*, that state law claims implicating a collective bargaining agreement covered by the RLA present a federal question and are removable to federal court. See, e.g. *Schroeder v. Trans World Airlines*,

³ Even though Count I alleges a discharge in violation of public policy, as expressed in FAA regulations, it does not state on its face a federal claim. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (incorporation of a federal standard in a state law cause of action does not create a federal question when Congress has not provided a private action for violations of that standard).

Inc., 702 F.2d 189, 191 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978). I am bound, however, to follow the most recent decisions of the Ninth Circuit. If I have not read *Price* correctly, the Ninth Circuit can "steady" me if it finds my "step faulty." *Price*, 829 F.2d at 876.

III. DISPOSITION OF CLAIMS

I have concluded that this court has federal question jurisdiction only over Count V. The remaining four state law claims are subject only to this court's pendant jurisdiction. HAL has moved for summary judgment on all of Norris's claims on the grounds that Norris has failed to exhaust the RLA's administrative grievance procedures. I conclude that summary judgment is inappropriate since it is a ruling on the merits, and the basis for the motion is lack of jurisdiction which is more properly treated as a motion to dismiss under Fed. R. Civ. P. Rule 12(h)(3). See *Miller v. Norfolk & W.R. Co.*, 834 F.2d 556, 562 (6th Cir. 1987) (where defense is that claim was really a minor dispute subject to RLA grievance procedures, claims may be dismissed on jurisdictional grounds but cannot be decided on the merits).

I conclude, however, that the claim Norris has stated in Count V of his complaint must be dismissed for lack of jurisdiction because it is subject to the exclusive administrative grievance procedures of the collective bargaining agreement and the RLA. A collective bargaining agreement between an air carrier and its employees is subject to the provisions of the RLA, 45 U.S.C. § 181. A claim for violation of a right secured by the collective bargaining

agreement is subject to RLA Section 2, First and Second, 45 U.S.C. § 152, and the grievance procedures specified in Article XV of the collective bargaining agreement and Section 204 of the RLA, 45 U.S.C. § 184. If the parties are unable to resolve their dispute through the grievance procedures of the collective bargaining agreement, they must submit their dispute to binding arbitration. See Article XVI of the Agreement; *I.A.M.A. v. Republic Airlines*, 761 F.2d 1386, 1389 (9th Cir. 1985) (if dispute arising out of the interpretation of a collective bargaining agreement is not resolved through internal grievance procedures, it may be referred to adjustment board, which has exclusive jurisdiction of dispute). Courts do not have jurisdiction over employment disputes within the exclusive jurisdiction of the arbitration boards established by the RLA. See *Andrews, supra*, 406 U.S. 320 (employee claiming breach of employment agreement must avail himself of grievance procedures established by RLA); *I.A.M.A. v. Alaska Airlines, Inc.*, 813 F.2d 1038, 1039-40 (9th Cir. 1987) (federal courts have no jurisdiction to resolve disputes concerning the application or interpretation of collective bargaining agreements); *I.A.M.A. v. Aloha Airlines*, 776 F.2d 812, 813 (9th Cir. 1985) (same).

In Count V Norris claims that certain acts of HAL, in particular those reflected in HAL's September 10, 1987 and September 14, 1987 letters, constitute a breach of the collective bargaining agreement. It is not disputed that Norris did not file a grievance with respect to the HAL conduct complained of in Count V or that the grievance process initiated with respect to HAL's conduct complained of in other paragraphs of the complaint was not

completed. Since Norris's claim for breach of the collective bargaining agreement involves an interpretation of the terms of that agreement and is subject to the grievance and arbitration provisions of the Agreement and the RLA, this court is without jurisdiction to entertain that claim.

Finally, I conclude that the state law claims in Counts I through IV should be remanded to state court. This court has pendant jurisdiction over these claims because they arise out of the same nucleus of operative facts. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). However, pendant jurisdiction is a doctrine of discretion, not of right, *id.* at 726, and I conclude that the state law claims should be remanded to state court rather than disposed of by this court. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 622 (1987). I recognize that relevant to the exercise of discretion is whether "the allowable scope of the state claim implicates the federal doctrine of preemption," *Gibbs* at 727, and that preemption is an issue here. However, this is just one factor a court can consider when exercising its discretion. A remand, rather than dismissal, of state law claims is appropriate when it will avoid additional costs to the parties, *Carnegie-Mellon* at 9-10, and when principles of federal-state comity are involved, *id.* Moreover, "[w]hen the single federal-law claim in the action [has been] eliminated at an early stage of the litigation, [there is] a powerful reason to choose not to continue to exercise jurisdiction." *Carnegie-Mellon, id.* at 619. I conclude that these concerns dictate that the Hawaii courts decide whether Norris's state law claims may proceed despite the RLA. Those courts are perfectly capable of deciding the issue, and, indeed, have resolved

a similar issue before. See *Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984) (claim of discharge in retaliation for filing workers compensation claim held not preempted by RLA).

I thus grant the motion to remand in part. I construe the motion for summary judgment as a motion to dismiss under Fed. R. Civ. P. Rule 12(h)(3) and grant the motion in part.

It is therefore ORDERED;

1) that Count V of the complaint be dismissed for lack of jurisdiction;

2) that Counts I through IV of the complaint be remanded to state court.

DATED this 24 day of March, 1988 at Anchorage, Alaska.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

EXHIBIT I
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GRANT T. NORRIS,	)	Civil No.
Plaintiff,	)	88-00010
	)	HMF
vs.	)	MEMORANDUM
HAWAIIAN AIRLINES, INC.,	)	AND ORDER
a Hawaii Corporation,)	
Defendants.	)	(Filed
	)	Nov. 21, 1988)

Grant Norris filed a complaint in state court stating five claims against Hawaiian Airlines ("HAL"): wrongful discharge in violation of public policy (Count I), a claim that HAL violated the Hawaii Whistleblowers' Protection Act (Count II), intentional infliction of emotional distress (Count III), a claim for punitive damages for outrageous conduct (Count IV), and a claim for breach of the collective bargaining agreement (Count V). HAL removed the case to federal court asserting federal question jurisdiction. Norris filed a motion to remand and HAL filed a combined opposition and a motion for summary judgment, arguing that the federal court had removal jurisdiction over Norris's claims because those claims were completely preempted by the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* HAL urged that removal preemption under the RLA was analogous to removal preemption under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and, relying on Section 301

cases, argued that this court had federal question jurisdiction. HAL then argued that the federal court lacked jurisdiction over the claims because they were subject to the exclusive arbitral remedies of the RLA.

I held that the case was initially removable because the claim for breach of the collective bargaining agreement was a federal claim arising under federal law. I dismissed that claim for lack of jurisdiction because such a claim is subject to the exclusive jurisdiction of the RLA grievance processes which had not been exhausted. As to the remaining claims, I held that "complete" or removal preemption analysis developed under Section 301 was inapplicable to claims arguably within the scope of the RLA because the RLA did not contain a civil enforcement provision such as that found in ERISA and Section 301. I relied on *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1732 (1988) which held that state law claims arguably within the scope of section 2, Fourth of the RLA were not completely preempted for purposes of removal jurisdiction because the RLA contained no civil enforcement provision. Although Norris's claims were not within section 2, Fourth of the RLA, but rather section 2, First or Second, I found *Price* applicable since section 2, First and Second also contain no civil enforcement provision. Although I recognized that HAL might have a valid federal defense to Norris's state claims (i.e. that those claims were "minor disputes" subject to the exclusive jurisdiction of the RLA grievance procedures), I held that those claims could not be recharacterized as federal claims by analogy to Section 301 and hence did not create

federal jurisdiction. Although I could have exercised pendant jurisdiction over the state claims, I exercised my discretion to remand the claims to state court.¹

HAL moved for reconsideration arguing that I had misread *Price* since *Price* did not directly involve a collective bargaining agreement and earlier Ninth Circuit cases suggested that "complete preemption" applicable under Section 301 also applied to the RLA. HAL supplemented its motion for reconsideration after the Supreme Court decided *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), which elucidated the proper Section 301 analysis. I scheduled oral argument on the motion and instructed the parties to assume that I agreed that I had misread *Price* and to focus their argument on *Lingle*. At oral argument, therefore, the parties assumed that a Section 301 analysis such as that in *Lingle* applies to claims governed by the RLA.

This area of the law is rather complicated because there are various concepts which are all called "preemption". In this case two preemption doctrines converge. The first is what may be called "claim preemption" or removal preemption and it governs the removability of claims from state to federal court. Under this doctrine a federal court has jurisdiction only over "state court

¹ If the four remaining claims are state claims then this court has pendant jurisdiction over those claims. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). I have discretion to remand pendant state law claims. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614 (1988). If, however, the four remaining claims can be "recharacterized" as federal claims, then federal question jurisdiction exists over those claims and I have no discretion to remand those claims. See *Price*, 829 F.2d at 875.

actions that originally could have been filed in federal court." *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987). Ordinarily a federal defense to a well-pleaded state claim does not give rise to federal question jurisdiction. *Id.* at 2430. In some cases, however, a federal statute may have such an "extraordinary" preemptive force that it converts a state claim to a federal claim providing a basis for federal subject matter jurisdiction. *Id.* Section 301 of the LMRA is such a statute. The second broad preemption doctrine involves various theories of labor law preemption, one of which may be called "forum preemption" and it governs the jurisdiction of any court to hear claims subject to the grievance and arbitration provisions of federal labor statutes such as the RLA or the NLRA. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (if activity is arguably subject to § 7 or § 8 of the NLRA, state as well as federal courts must defer to exclusive jurisdiction of NLRB). Although the law is far from clear and cases can be found which do not seem to distinguish the jurisdictional implications of the two doctrines, I believe that "claim preemption" as developed under Section 301 does not apply in this case.²

² Norris could not state a claim under Section 301 of the LMRA because employers who are covered by the RLA are specifically excluded from the definition of employer contained in the LMRA. *See* 29 U.S.C. § 152(2). An employee who claims that his employer has breached the collective bargaining agreement must pursue the grievance procedures created by the RLA. Neither a federal court nor a state court has jurisdiction over claims subject to the RLA grievance procedures until those procedures have been exhausted. Since Norris has no federal claim similar to a Section 301 claim I believe that preemption under the RLA is merely a federal defense which does not give rise to

Thus, I do not believe that Norris's state claims can be "recharacterized" as federal claims for removal purposes pursuant to the analysis developed under Section 301. *See generally Miller v. Norfolk & Western Railway Co.*, 834 F.2d 556 (6th Cir. 1987) (discussing the various preemption doctrines applicable in RLA case and the "difficult and subtle issues" that arise and expressing doubt that Section 301 preemption doctrine applies to RLA cases); *see also Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877, 1883 n. 8 (1988) (distinguishing Section 301 preemption from other labor law preemption doctrines).

It is true that whatever state law claims Norris has may be subject to the defense that the claims are within the exclusive jurisdiction of the RLA grievance procedures. *See, e.g., Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1290 (9th Cir. 1986) (any claim that can be characterized as a "minor dispute" under the RLA is within the exclusive jurisdiction of the arbitral authority created by the RLA). However, the issue presently before this court is one of federal subject matter jurisdiction and a federal defense does not provide federal question jurisdiction. *See, e.g., Caterpillar*, 107 S.Ct. at 2432 (fact that defendant may ultimately provide that state claims are preempted by NLRB's exclusive jurisdiction does not establish that they are removable to federal court) (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)); *see generally Franchise Tax Board v. Construction Laborers Trust*, 463 U.S. 1 (1983). Thus I concluded that

removal jurisdiction. *See, e.g., Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2430 (1987) (ordinarily federal pre-emption is a defense that does not give rise to removal jurisdiction).

this court has no federal question jurisdiction over Norris's claims even though those claims might be subject to the federal defense of forum preemption.

HAL urges, however, that this court has federal question jurisdiction because Norris's state law claims are completely preempted by the RLA in the same manner that such claims would be completely preempted under Section 301. HAL relies on several cases which have seemingly applied "claim preemption" to RLA cases. *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *see also Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972).³ None of these cases, however, fully discussed or analyzed the question of removal jurisdiction in light of the recent Supreme Court cases which have elucidated the doctrine. *See, e.g. Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987); *Franchise Tax Board v. Construction Laborers Vacation Trust* 463 U.S. 1 (1983). The Ninth Circuit in *Price* adopted a removal analysis which incorporates these decisions and I followed *Price*. However, *Price* did not deal precisely with claims arguably

³ In *Andrews* an employee subject to the RLA filed a claim in state court for breach of contract based on a wrongful discharge. The Supreme Court held that the claim was subject to the grievance and arbitration procedures of the RLA since the source of the employee's right was the collective bargaining agreement. The basis for federal jurisdiction in *Andrews* was unclear. Nevertheless, the Supreme Court in *Andrews* relied in part on cases considering preemption under Section 301.

within the scope of a collective bargaining agreement under the RLA and may not apply in this case. Furthermore, even if *Price* could be construed to apply in cases such as this, it may be inconsistent with the earlier Ninth Circuit decisions in *Beers*, *Schroeder* and *Magnuson* which found that removal of state law claims that were subject to RLA preemption was proper. Since *Price* was a panel decision and not *en banc* I must follow *Beers*, *Schroeder* and *Magnuson* and determine whether Norris's claims are completely preempted for removal purpose by the RLA. *See, e.g., Antonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n. 6 (9th Cir.), *withdrawn*, 787 F.2d 462 (9th Cir. 1985), *reversed*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*) (panel decision is the law of the circuit until overruled by *en banc* court); *LeVick v. Skaggs Co., Inc.*, 701 F.2d 777, 778 (9th Cir. 1983) (absent *en banc* decision, prior panel decision is controlling authority for subsequent panel).

I. Claim Preemption

The parties rely on the recent Supreme Court case *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), and several recent Ninth Circuit cases construing *Lingle*. *Newberry v. Pacific Racing Association*, 854 F.2d 1142 (9th Cir. 1988); *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988); *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988). In *Lingle* the Supreme Court held that a worker's claim that she had been discharged in violation of the Illinois Workers' Compensation Act was not preempted under Section 301. The Court held that a state law claim is preempted by Section 301 only if application of state law "requires" the interpretation of a collective bargaining agreement. 108 S.Ct. at 1885. To determine

whether the state law claim was preempted, the Supreme Court first looked to the elements of the state law claim. *Id.* at 1881-82. In *Lingle* the state law tort required a showing that (1) the employee was discharged or threatened with discharge, and (2) the employer's motive in discharging or threatening to discharge was to deter the employee from exercising her rights under the Illinois Workers' Compensation Act. *Id.* at 1882. The Court concluded that the state tort claim did not require an interpretation of the collective bargaining agreement:

Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of the collective bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. Thus the state law remedy in this case is 'independent' of the collective bargaining in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state law claim does not require construing the collective bargaining agreement.

Id. (citations omitted).

The Court rejected the analysis relied on by the court of appeals and concluded that even though a state law analysis "might well involve attention to the same factual considerations as the contractual determination of whether *Lingle* was fired for just cause" under the terms

of the collective bargaining agreement, such "parallelism" does not render the state law claim preempted by Section 301. *Id.* at 1883. The Court reemphasized that Section 301 preemption:

merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a state may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes.

Id. (footnotes omitted). The Court also rejected any analysis that would turn on whether the state law rights were "negotiable" or "nonnegotiable" since certain "nonnegotiable" state law rights may still require interpretation of a collective bargaining agreement. *Id.* at 1882 n. 7.

The *Lingle* Court reaffirmed the approach adopted in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). In *Lueck* the Supreme Court held that a state law claim for bad-faith handling of an insurance claim was preempted by Section 301 when applied to the handling of a claim under a disability plan included in a collective bargaining agreement. In *Lueck* the court held that a state tort law is preempted if it:

confers nonnegotiable state-law rights on employers or employees independent of any

right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state law purports to define the meaning of the contract relationship, that law is pre-empted.

Id. at 213. The tort in *Lueck* was preempted because "the tort exists for breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself.'" *Id.* at 216 (quoting *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 1, 13-16, 235 N.W. 413, 414-15 (1931)). Since the "duties imposed and rights established through the state tort . . . derive from the rights and obligations established by the contract," *id.* at 217, the state tort was preempted by Section 301.

In *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988) the Ninth Circuit held that an employee's state law claim alleging discrimination based on handicap, in violation of an Oregon statute protecting the physically handicapped, was not preempted by Section 301. Miller claimed that he was discharged in violation of the Oregon statute and sued his employer in state court. His employer then removed the action to federal court, asserting that Miller's claims were inextricably intertwined with the terms of the pertinent collective bargaining agreement. The court reasoned:

If a court can uphold state rights without interpreting the terms of a [collective bargaining agreement], allowing suit based on the state rights does not undermine the purpose of section 301 preemption: guaranteeing uniform

interpretation of terms in collective bargaining agreements. . . . [W]e cannot accept defendants' claim that parallel protection in collective bargaining agreements mandates preemption. . . . Finding preemption whenever [collective bargaining agreements] offer protections similar to those provided by state law is inappropriate because it fails to distinguish between state laws that require interpretation of the terms in a [collective bargaining agreement] and state laws that disallow all agreements to particular terms.

Id. at 545-47 (citations omitted). The Ninth Circuit found that the Oregon handicap statute as construed by the Oregon Supreme Court did not require interpretation of any terms of the collective bargaining agreement because the employee's rights under the statute were not controlled by the question of whether or not the employer acted in good faith or no reasonable grounds. *Id.* at 549. Instead, an employee's rights under the statute depended only upon a factual inquiry as to whether the employee can or cannot do the job in a satisfactory manner. *Id.*;⁴ see

⁴ Although *Miller* was originally decided without reference to *Lingle*, in an amended opinion the Ninth Circuit stated that *Lingle* "confirms the approach we have taken in this opinion." *Miller*, slip op. at 10188 (9th Circuit, August 24, 1988).

In *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142 (9th Cir. 1988) the Ninth Circuit considered whether an employee's claims for breach of an implied covenant of good faith and fair dealing and intentional infliction of emotional distress were preempted under Section 301. *Newberry* had initially filed her claims in state court and the defendant had removed the action to federal court. The Ninth circuit found that *Newberry's* claims were preempted because her claims "require[d] [the court] to interpret the specific language of the [collective bargaining] agreement's terms. *Id.* at 1147-48.

also *Ackerman v. Western Electric Co.*, slip op. (9th Cir., November 8, 1988).

Thus the question whether a state law claim is preempted by Section 301 depends first upon an analysis of the state law claim asserted. If an element of the state law claim is derived from or dependent upon a right or duty established by contract and the contract at issue is a collective bargaining agreement, then the state law claim will be preempted. On the other hand, if the elements of the state law claim exist independently of any contract then the state law claim will not be preempted. The fact that the collective bargaining agreement may establish similar or parallel rights does not establish preemption, nor does the fact that certain facts may be common to both an inquiry conducted pursuant to the agreement and an inquiry required by a state law analysis.

II. State Law

A. Hawaii Whistleblowers' Protection Act

Norris has claimed that HAL discharged him in violation of the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. § 378-61 *et seq.* The Act provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) The employee . . . reports or is about to report to a public body, verbally or in writing, a violation or suspected violation of a law or rule adopted pursuant to the law of this State, a

political subdivision of this State, or the United States, unless the employee knows that the report is false; . . .

Haw. Rev. Stat. § 378-62. The Act confers a civil cause of action for violations of the Act. Haw. Rev. Stat. § 378-63. The Act also provides that it "shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement." Haw. Rev. Stat. § 378-66(a). Finally, the Act states:

Where a collective bargaining agreement provides an employee rights and remedies superior to the rights and remedies provided herein, contractual rights shall supercede [sic] and take precedence over the rights, remedies, and procedures provided in this part. Where a collective bargaining agreement provides inferior rights and remedies to those provided in this part, the provisions of this part shall supercede [sic] and take precedence over the rights, remedies, and procedures provided in the collective bargaining agreement.

Haw. Rev. Stat. § 378-66(b).

The Hawaii courts have yet to construe the scope of this Act or the nature of the cause of action conferred by the Act. However, several other states have similar acts which have been considered by the courts. Michigan, in particular, has a whistleblowers' act that is virtually identical to Hawaii's act and has been construed by the courts of that state. See *Hopkins v. City of Midland*, 404 N.W.2d 744 (Mich. App. 1987); *Tuttle v. Bloomfield Hills School Dist.*, 402 N.W.2d 54 (Mich. App. 1986). In *Hopkins* the court set forth the *prima facie* elements of a claim under the whistleblowers' act:

[P]laintiff must prove: (1) that plaintiff was engaged in protected activity as defined by the act; (2) that plaintiff was subsequently not promoted [or discharged]; and (3) that a causal connection exists between the protected activity and the failure to promote [or discharge].

404 N.W.2d at 751. If the plaintiff makes out a prima facie case, the burden shifts to the defendant to show some nonretaliatory reason for the discharge. *Id.* If the defendant shows a nonretaliatory reason for the discharge, the plaintiff may show that the reason proffered [sic] by the defendant was only a pretext. *Id.*

None of the elements of a claim under the Whistleblowers' Act is derived from or depends upon a right conferred by a collective bargaining agreement or any other contract. The elements of a claim under the Act are, in fact, similar to the elements of the claim which the *Lingle* court found not preempted. 108 S.Ct. at 1882 (employee must show discharge and that employer's motive in discharge was to deter employee from exercising rights under Act). In this case, as in *Lingle*, the existence of a cause of action turns on the "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer." *Id.* Moreover, to defend against a claim under the Act in this case, as in *Lingle*, the employer must show that it had a non-retaliatory reason for the discharge, a "purely factual inquiry [which] likewise does not turn on the meaning of any provision of a collective bargaining agreement. *Id.*

HAL argues that a claim under the Whistleblowers' Act is preempted because that Act "explicitly requires the

court to interpret the rights and remedies of any applicable collective bargaining agreement" in Section 378-66(b). Third supplemental Memorandum in Support of Motion for Reconsideration at 11. While I agree that the Act may require a court to compare the rights and remedies available to an employee under the Act with any rights and remedies available to an employee under an applicable collective bargaining agreement, I do not agree that this compels the conclusion that any claims under the Act are preempted. First, the Act makes clear that the rights and remedies it confers are independent of any similar or contrary provisions of a collective bargaining agreement.⁵ An employee who states a claim under the Act may recover irrespective of any provisions of his collective bargaining agreement. Second, although an employee may be entitled to *additional relief* under a collective bargaining agreement, a collective bargaining agreement cannot *diminish* his statutory rights. Thus an employee's substantive rights *under the Act* are independent of the terms of any collective bargaining agreement. Finally, the Supreme Court in *Lingle* explicitly rejected the argument HAL advances here:

A collective bargaining agreement may, of course, contain information such as rate of pay

⁵ See, e.g., *Hopkins*, 404 N.W.2d at 749 (construing Michigan Act):

[T]he act creates rights belonging to individual employees, not collectively represented groups. The substantive provisions of the act do not depend on whether an employee is subject to a collective bargaining agreement.

and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. . . . although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S., at 211, 105 S.Ct., at 1911, 'not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by § 301. . . .'

108 S.Ct. at 1885 n. 12 (citations omitted). Norris's claim under the Hawaii Whistleblowers' Protection Act exists completely independently of any provisions of his collective bargaining agreement: no element in his prima facie case or in the possible defense requires or depends on any interpretation of his collective bargaining agreement. The provision of the Act ensuring that any additional rights and remedies provided in a collective bargaining agreement are not limited by the Act has no impact on Norris's substantive rights under the Act.⁶

⁶ The Michigan courts have also concluded that claims under its whistleblowers' act are independent statutory rights. *Hopkins*, 404 N.W.2d at 750; *Tuttle*, 402 N.W.2d at 56-57.

III. Wrongful Discharge in Violation of Public Policy

Norris has also stated a claim for wrongful discharge in violation of public policy, claiming that his discharge was "in violation of the public policy expressed in the Federal Aviation Act and the Federal Aviation Regulations." Norris relies on *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982) in which the Hawaii Supreme Court held that "an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy." *Id.* at 631.

HAL first argues that this claim is preempted because Norris alleges a violation of federal public policy rather than state public policy, citing *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1486 (1984). The Ninth Circuit has noted that *Olguin* was decided before *Allis-Chalmers* and is "no longer binding precedent." *Miller*, 850 F.2d at 549 (citing *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 565-66 (9th Cir. 1987)). *Olguin* is in any event distinguishable. The court in *Olguin* concluded that the plaintiff "cannot now seek protection in state law" because Arizona "has little interest in enforcing federal law." The Supreme Court of Hawaii, however, has recognized that the state tort of wrongful discharge in violation of public policy includes allegations that the discharge violated a federal policy. *Parnar*, 652 P.2d at 631 (finding the relevant public policy in the federal antitrust laws).

HAL also argues that Norris's claim is preempted because the Hawaii Supreme Court would not extend the *Parnar* remedy to an employee covered by a collective

bargaining agreement. HAL notes that *Parnar* discussed the state tort as an exception to the "at-will" doctrine and thus concludes that the tort of wrongful discharge in violation of public policy applies only to "at-will" employees. Norris notes that the *Parnar* court did not explicitly limit its holding to "at-will" employees and that some states have extended the tort to employees covered by a collective bargaining agreement. HAL counters that other states have limited the tort to "at-will" employees. I conclude that I need not resolve this issue because it involves the merits of Norris's claim and is inapposite to the only question presently before me: whether this court has federal question jurisdiction over a claim for wrongful discharge in violation of public policy. To determine this issue I must simply look to the claim alleged in the complaint and, assuming that the claim is valid, apply *Lingle* to determine whether the claim is preempted by federal law. If the claim is not preempted this court has no jurisdiction and cannot reach the merits. If the claim is preempted this court may reach the merits and determine whether the tort would apply to an employee such as Norris.

The question under *Lingle* is whether a claim for wrongful discharge in violation of public policy is a claim derived from or dependent on the terms of a collective bargaining agreement.⁷ To state a claim for wrongful

⁷ HAL's argument that the state tort does not apply to employees covered by a collective bargaining agreement seems to answer this question: if the claim exists only for "at-will" employees who do not have a collective bargaining agreement, then the claim probably does not derive from or depend on the terms of a collective bargaining agreement under *Lingle*.

discharge in violation of public policy, an employee must show (1) that there is a clear mandate of public policy; and (2) that his discharge was motivated by reasons that contravene a clear mandate of public policy. See generally *Parnar*, 652 P.2d at 631-32; *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984) (*en banc*). Once the employee has made this threshold [sic] showing, the burden shifts to the employer to show that the discharge was for reasons other than those alleged by the employee. *Thompson*, 685 P.2d at 1089.

This cause of action, like the cause of action in *Lingle*, does not require an interpretation of the collective bargaining agreement. The public policy is not found in the collective bargaining agreement but in "a constitutional, statutory, or regulatory provision or scheme." *Parnar* at 631. The motivation of the employer is a "purely factual" question. *Lingle*, 108 S.Ct. at 1882. To defend against the claim an employer must show that it was not motivated by a reason that contravenes public policy: "this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. *Id.* I therefore conclude that Norris's claim that HAL discharged him in violation of public policy is not preempted under *Lingle*. See also, e.g., *DeSoto v. Yellow Freight Systems, Inc.*, 851 F.2d 1207 (9th Cir. 1988) (reversing decision reported at 820 F.2d 1434 and holding that employee's claim that he was discharged for refusing to violate state law was not preempted under *Lingle*); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987), cert.

denied, 108 S. Ct. 2819 (1988) (claim for wrongful discharge in violation of public policy not preempted by section 301).⁸

IV. Emotional Distress

Norris asserts a claim for emotional distress, alleging that HAL's actions, "including the manner in which Norris's discharge hearing was conducted by a kangaroo court, the manner in which Norris was intimidated under pain of suspension and/or discharge to falsify aircraft maintenance records, and the manner in which Norris was threatened by the Assistant Director when the latter had been notified of Norris' report to the FAA."

In Hawaii a defendant may be liable for intentional infliction of emotional distress if his acts were "unreasonable," which is construed to mean "without just cause or excuse and beyond all bounds of decency" or "outrageous." *Chedester v. Stecker*, 643 P.2d 532, 535 (Hawaii 1982). The Ninth Circuit has noted that "[b]ecause the tort requires inquiry into the appropriateness of the defendant's behavior, the terms of the [collective bargaining agreement] can become relevant in evaluating

⁸ The fact that the collective bargaining agreement also provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action" does not mandate a finding of preemption since *Lingle* made clear that "such parallelism" between a state cause of action and rights under the collective bargaining agreement does not require a finding of preemption. 108 S.Ct. at 1883. See also *Ackerman*, slip op. at 13902.

whether the defendant's conduct was reasonable" since actions permitted by the agreement 'might be deemed reasonable.'" *Miller*, 850 F.2d at 550. The *Miller* court concluded that in emotional distress cases independence from the collective bargaining agreement will be difficult to find. The Court noted, however, that these considerations

do not lead to preemption of all emotional distress claims. Such claims may not be preempted if the particular offending behavior has been explicitly prohibited by mandatory statute or judicial decree, and the state holds violation of that rule in all circumstances sufficiently outrageous to support an emotional distress claim.

Id. at n. 5. I conclude that Norris's emotional distress claim is not preempted to the extent that it is based upon conduct that is prohibited by the Hawaii Whistleblowers' Protection Act or the tort of wrongful discharge in violation of public policy. Since I have concluded that Norris' claims against HAL based the whistleblowers' act and the state tort are not preempted, a claim for emotional distress based on the same conduct is not preempted. The Hawaii courts may determine that conduct in violation of the Act or public policy is *per se* outrageous. The conduct which forms the basis for the emotional distress claim is not controlled by the collective bargaining agreement but by independent state laws. However, Norris's emotional distress claim is preempted to the extent that it is premised on the conduct of the employer in carrying out the procedures established by the collective bargaining agreement. See *Newberry*, 854 F.2d at 1149 (emotional distress claim preempted where it was clear that claim arose

out of discharge and defendant's conduct in investigation leading to discharge).

V. Punitive Damages

Norris has also stated a claim for punitive damages. The claim is based on all the factual allegations of the complaint *except* those alleged in conjunction with the claim that HAL breached the collective bargaining agreement. Complaint, Paragraph 32. I conclude that the claim for punitive damages is not preempted since it is not premised upon conduct governed by the collective bargaining agreement but rather upon conduct which gives rise to an independent state law claim.

VI. Conclusion

I have reconsidered my previous order and conclude that even if the doctrine of "complete" or removal preemption developed under Section 301 applies to state law claims arguably within the scope of the RLA, Norris's state law claims are not "completely" preempted and hence were not properly removed to this court. I continue to believe, however, that the removal preemption doctrine articulated by the Supreme Court with respect to Section 301 suits is inapplicable to state law claims that are arguably "minor disputes" subject to the exclusive jurisdiction of the RLA grievance procedures. Preemption under the RLA, unlike "complete" preemption under Section 301, is a federal defense which does not provide a basis for federal subject matter jurisdiction.

IT IS THEREFORE ORDERED that, having reconsidered my previous order and reaching the same result, Counts I through IV of the Complaint be remanded to state court and Count V be dismissed.

DATED this 16th day of November, 1988 at Anchorage, Alaska.

James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

EXHIBIT J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAWAIIAN AIRLINES, INC.,	)	No. 89-700006
Petitioner,	)	DC#
vs.	)	CV-88-000100-
	)	HMF
UNITED STATES DISTRICT COURT	)	Hawaii
FOR THE DISTRICT OF HAWAII,	)	ORDER
Respondent.	)	(Filed
	)	May 18, 1989)
GRANT T. NORRIS,)	
Real Party in Interest.)	

Before: BROWNING, THOMPSON and LEAVY, Circuit Judges

The petition for writ of mandamus is denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO. 87-3894-12
Plaintiff,)	
v.	)	DEPOSITION UPON
	)	WRITTEN
HAWAIIAN AIRLINES, INC.,	)	INTERROGATORIES
Defendant.	)	TRIAL DATE: 3/26/90

DEPOSITION OF RICHARD S. TEIXEIRA

RECORDS OF: CUSTODIAN OF RECORDS
Federal Aviation Administration
FAA Flight Center
90 Nakolo Place
Room 215
Honolulu, Hawaii 96819

taken upon written interrogatories on behalf of the Plaintiff on December 6, 1989, commencing at 9:30 a.m., at the offices of the Federal Aviation Administration, FAA Flight Center, 90 Nakolo place, Room 215, Honolulu, Hawaii 96819, pursuant to Rule 31, *Hawaii Rules of Civil Procedure*.

BEFORE: DAVID W. REITZ III
notary Public State of Hawaii

[p. 2] ATTORNEYS OF RECORD

Attorneys for Plaintiff:

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 Financial Plaza of the Pacific
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 Honolulu, Hawaii 96813

[p. 3] *RICHARD S. TEIXEIRA* called upon written interrogatories by and on behalf of the plaintiff, *GRANT T. NORRIS*, having been first sworn to tell the truth in his interrogatories propounded to him by the Notary Public, made the following:

1. Q Please state Your name and address for the record.

A Richard S. Teixeira.

2. Q By whom are you employed?

A Federal Aviation Administration.

3. Q Describe briefly your duties with your employer?

A I am the acting manager of the Honolulu Flight Standards District Office. My responsibility is for all functions of all employees in the office.

4. Q Have you been designated the Custodian of Records of the Federal Aviation Administration for the purposes of appearing and testifying at this deposition?

A Yes.

5. Q Were you served with a Subpoena Duces Tecum demanding your appearance here today and directing

You to bring with you certain documents described in [p. 4] the Subpoena Duces Tecum?

A I was not served personally. The FAA was served.

6. Q Have you brought with you any documents today in response to the Subpoena Duces Tecum?

A Yes I have.

7. Q Please describe in general terms the documents that you have brought with you today, if any.

A What I brought is the FAA's Enforcement Investigative Report No. 87 WP 130109. I have brought three (3) letters related to that Report, dated March 2, 1988 to Hawaiian Airlines from DeWitte Lawson, Jr., dated March 17, 1988 to Paul J. Finazzo of Hawaiian Airlines from H. C. McClure, and April 13, 1989 to John B. Hill from DeWitte Lawson, Jr. All three of these letters relate to Report No. 87 WP 130109. And I have brought copies of 26 depositions.

8. Q Are there any documents in the custody or possession of the Federal Aviation Administration that are responsive to the Subpoena Duces Tecum, but which you have not brought with you today?

A No.

9. Q If your answer to the preceding question is in the affirmative, please state the reasons why you have not brought such other documents with you here [p. 5] today.

A Not applicable.

10. Q Are the documents that you have brought with you here today documents maintained by the Federal

Aviation Administration in the ordinary course and scope of its business?

A Yes.

11. Q Would you please turn the documents over to the Court Reporter at this time for numbering and copying so that they may be attached as Exhibits to the transcript of this deposition?

A Yes. We are turning these over to be copied and returned to us.

12. Q Are you willing to waive the signing of this deposition?

A Yes.

(WHEREUPON THE DEPOSITION WAS CONCLUDED.)

Norris-FAA.rd

[p. 1] IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.)	
HAWAIIAN AIRLINES, INC.,)	
Defendant.)	
_____	)	<u>Volume 1</u>

DEPOSITION OF THOMAS SEALY, Taken on behalf of Defendant at the offices of Goodsill Anderson Quinn & Stifel, 1600 Bancorp Tower, 130 Merchant Street, Honolulu, Hawaii, 96813, commencing at 9:12 a.m. on Tuesday, January 9, 1990.

REPORTED BY: JOAN IZUMIGAWA, CSR No. 136
Notary Public, State of Hawaii

* * *

[p. 137] A It was around 5:00 a.m.

Q We're at the stage in your testimony, I believe, where you're attempting to get off the inner bearing. Now, if you would set the scene for me again. Who was present at that time while you're using the 2 screwdrivers to try to pry off the inner bearing?

A Myself, John Daniels, Grant Norris, Hank Wong, and periodically coming and going was the lead and also Justin.

Q Now, exactly when did Justin walk up?

A I believe the first time he came up was when we were wrestling with the inner bearing.

Q Had any comments been made, other than that one comment that you alluded to earlier, regarding the condition of the sleeve by anybody at that time, at the time Justin walks up while you were wrestling with the inner bearing?

A I can't remember what was - what was being said. I - I just remember that we were having trouble with the sleeve and - and we were discussing, you know, the damage that was on the sleeve with Hank Wong.

Q So prior to - excuse me. Did you misstate? You were having trouble with the bearing, inner bearing, or with the sleeve?

A We were having trouble - we were having [p. 138] trouble getting the bearing off of the sleeve.

Q Okay. So you had discussed the damage with Hank Wong prior to Justin Culahara walking up?

A I can't remember that.

Q Do you remember anything that was said regarding the - the sleeve prior to Justin Culahara walking up?

A Yes.

Q Tell me everything that you recall that was said regarding the sleeve prior to Justin Culahara walking up.

A We just - you know, we were discussing the sleeve with Hank and - you know, and we pointed out to him, you know, "Look at this damage on here." You know, "This - this isn't supposed to be like this." And

Hank Wong, he agreed with what we were saying, and he recommended that he wanted the sleeve to be changed.

Q Okay. Do you remember who said - do you remember anything else that was said about the condition of the sleeve before Culahara walks up?

A No.

Q Do you remember who said, "Look at this damage. This isn't supposed to be like this"?

A No.

Q Do you remember precisely that Mr. Wong said [p. 139] that he agreed with that statement?

A He was just nodding to what we were saying and - you know, that, "Yeah, this sleeve is bad and it should be changed."

Q Okay. Did he nod or did he make a statement?

A I can't remember.

Q Did he make a statement that the sleeve should be changed?

A Yes.

Q Do you remember what his words were when he made that statement?

A Just that the sleeve should be changed.

Q Okay. This is at the time before the inner bearing is removed?

A Yes.

Q Do you recall anybody else saying anything about the condition of the sleeve prior to Justin Culahara arriving?

A Our lead.

Q Okay. Is that the statement you testified to earlier about, "You should see the one on Aircraft 69"?

A Yes.

Q Did Mr. Nishibun say any other statement aside from that one?

A I can't recall.

[p. 140] Q Okay. Did anybody else aside from Mr. Nishibun and what you've just testified to make any statement about the condition of the sleeve before Justin Culahara walked up?

A Just our - just our conversation between the mechanics and Hank, you know, talking about the damage. That's all that I can remember.

Q Do you remember if Mr. Norris said anything about the condition of the sleeve?

A We all talked about it.

Q Do you remember if Mr. Daniels said anything in particular about the condition of the sleeve?

A We all talked about it.

Q Okay. Now, Mr. Culahara comes walking up. What is said when he walks up?

A He said that the sleeve was fine, and then when we showed him, meaning the mechanics and Hank Wong,

when we were - when we pointed out this damage to him, he ordered me to go to supply and get some sandpaper and sand down the burr marks on the sleeve.

Q Did he say anything else?

A Not at that time.

Q Did anyone say anything in response to his statement that, "This sleeve is fine"?

A I can't remember.

[p. 141] Q Do you remember if Mr. Norris said anything in response to that statement?

A Not at that time.

Q Did Mr. Wong say anything to him, to Justin Culahara?

A He told him that - that he wanted the sleeve to be changed.

Q Did he say why?

A Because it was damaged.

Q He wanted the sleeve to be changed because it was damaged?

A I can't remember the words he used, but he had informed him that he did want the sleeve changed.

Q What did Mr. Culahara say in response to that?

A His response was - was only to get it - a new tire back on the plane and get the plane out to the terminal for a 6:00 o'clock flight.

Q So did he respond as to whether - as to the damage on the sleeve? Did he say anything about the damage on the sleeve?

A He only told me to go to supply and get sandpaper and sand down the burr marks.

Q Was anything else said - well, let me ask you this: Did you then go and get some sandpaper?

A Yes.

* * *

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	Civil No.
Plaintiff,	)	87-3894-12
)	
vs.)	
)	
HAWAIIAN AIRLINES, INC.,)	
Defendant.)	
<hr/>		
GRANT T. NORRIS,)	
Plaintiff,	)	Civil No.
	)	89-2904-09
PAUL J. FINAZZO; HOWARD)	
E. OGDEN; HATSUO HONMA;)	
and DOES 1-50,)	
Defendants.)	
<hr/>		

DEPOSITION OF SAMSON POOMAIHEALANI,
Taken on behalf of Plaintiff, at the offices of Cades,
Schutte, Fleming & Wright, 1000 Bishop Street, 10th Floor,
Honolulu, Hawaii 96813, commencing at 8:50 a.m., on
Thursday, February 15, 1990, pursuant to Notice.

BEFORE:

GRACE HOYT, RPR, CSR 272
Notary Public, State of Hawaii

* * *

[p. 4] (Pursuant to Rule of the Rules governing Court
Reporting in Honolulu, the Reporter's Disclosure was
made and is attached hereto.)

SAMSON POOMAIHEALANI, called as a witness on behalf of Plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MS. MOLLWAY:

Q. Would you state your name?

A. Samson Poomaihealani.

Q. And your address?

MR. RECKTENWALD: I'm sorry. Just for the record, I am going to note our objection to the double noticing of the depositions in the Finazzo matter and the Hawaiian Airlines matter, as we stated in our correspondence.

Q. (By Ms. Mollway) Could you state your residence address?

A. My residence address is 45-825 Anoi Road, Kaneohe, 96744.

Q. Are you presently employed?

[p. 5] A. Yes, I am.

Q. Who is your present employer?

A. I'm employed by the International Association of Machinists and Aerospace Workers, District Lodge 141.

Q. OK. And how long have you been employed by the IAM?

A. I've been employed with them since May of 1985.

Q. What is your present position?

A. My present position is an assistant general chairman.

Q. Have you held the same position since May of 1985?

A. No.

Q. What position did you hold when you joined the IAM?

A. The position I held when I was in office was vice president, Hawaii.

Q. Was that in May of '85?

A. Yes.

Q. And how long did you hold that position?

A. I held that office until December 31st, 1987.

Q. When you say "in office," what do you mean?

[p. 6] A. Well, I've been a member of the IAM since 1963.

Q. OK. So 1985 was when you began to be employed on the staff of the IAM?

A. Solely employed by the union.

Q. Starting January 1, 1988, what position did you hold on the staff of the union?

A. The position I'm presently holding, which is assistant general chairman.

Q. And have your duties as assistant general chairman generally stayed the same throughout the period that you've been the assistant general chairman?

A. Yes.

Q. What were your duties as vice president for Hawaii?

A. My duties as the vice president was to be in negotiations with the contracts that we have with the various companies and then servicing those contracts, and primarily handling grievances that are at the third step of appeal and then into arbitration.

Q. OK. I would like you to explain what you mean by "grievances at the third step of appeal."

A. In the grievance procedures that we have in our grievance, there is first-step grievance, which is [p. 7] between a shop steward and shift supervisor or foreman. If that grievance isn't settled at the first step, it's processed to the second step of the grievance procedure. And at that time the local committee would handle the grievance with the department manager. If that grievance is still unresolved, it is sent to my office, and at that point I process a third-step grievance form and submit to the company, normally to the Industrial Relations representative.

Q. And what is the procedure that is followed in a third-step grievance?

MR. RECKTENWALD: Excuse me. Are you talking at any of the airlines that he represents?

MS. MOLLWAY: That's a good objection.

Q. Are the procedures the same -

A. No.

Q. - For all the - OK.

What is the procedure at Hawaiian Airlines when you have a third-step grievance after you submitted this form?

A. At Hawaiian Airlines I have 15-day period to submit a grievance to the third step of appeal, and it's my job to be sure that the grievance is in fact submitted so as not to be caught in the time limits of [p. 8] the appeal.

Q. And is there, then, a hearing at that third step?

A. After the receipt of the grievance forms that I have submitted to the company, I normally call and try to schedule a third-step hearing.

Q. And who at Hawaiian Airlines, when there are third-step grievances, normally participates in a third-step grievance hearing?

MR. RECKTENWALD: I'll object to it. It's vague and ambiguous as to the word "participates."

Q. (By Ms. Mollway) Go ahead.

A. The grievance itself is submitted to the Industrial Relations Department. At the time of this grievance, there was an Industrial Relations Department.

Q. You mean in the fall of 1987?

A. Yes. At the present time there isn't. So at that time I submitted it to the director of Industrial Relations.

Q. Had you ever been involved with a third-step grievance hearing at Hawaiian Airlines before that time?

A. Yes.

Q. OK. And what had happened after the [p. 9] submission of this grievance form to the director of Industrial Relations?

MR. RECKTENWALD: I'll object to the question as compound.

Q. (By Ms. Mollway) Go ahead.

A. In the letters that I sent with the third-step grievance forms, I advised the company that we are appealing the grievance to the third step of appeal, and that upon receipt of my copies of the third step forms, I would contact them and arrange to have a third-step hearing date.

Q. And did you ever have a third-step hearing with Hawaiian Airlines?

MR. RECKTENWALD: I'm sorry. In any case?

MS. MOLLWAY: In any case.

THE WITNESS: Many.

Q. (By Ms. Mollway) OK. And did you yourself attend the hearing?

A. Yes.

Q. OK. How many did you have third-step hearings that you attended at Hawaiian Airlines?

A. Approximately 40 to 50 per year.

Q. Do you remember the level of person who would attend the third-step grievance hearing on behalf of Hawaiian Airlines?

[p. 10] MR. RECKTENWALD: I'll object as vague and ambiguous.

THE WITNESS: I need to have that more clearly stated.

Q. (By Ms. Mollway) OK. You had indicated that on the first step normally the shop steward or the shift supervisor or foreman would deal with the employee. And at the second step there was a local committee that the department would normally - and the department would normally handle that.

At the third step, was there some person higher than a department head who typically would represent Hawaiian Airlines?

MR. RECKTENWALD: Same objection.

THE WITNESS: Not represent, but be in attendance.

Q. (By Ms. Mollway) Be in attendance. OK. And what level of person would typically be in attendance for Hawaiian Airlines?

A. Again, you need to be more clear on that. When you say "what level," are you saying who is in attendance? And if you're saying who is in attendance, who's representing the company's position?

Q. Would it be an employee who would be in company representative there?

[p. 11] A. Yes.

Q. OK. And was it normally someone ranked higher than a department head who would be the representative for the company at the third-step hearing?

A. It would be the department head where the grievance was started.

Q. Was typically an attorney present for Hawaiian Airlines at a third-step hearing?

MR. RECKTENWALD: I'll object. Lack of foundation.

THE WITNESS: No.

Q. (By Ms. Mollway) OK. What typically was different about the third-step hearing from the second-step hearing?

A. The hearing officer.

Q. Is it a hearing officer from outside of Hawaiian Airlines?

A. No, from the company.

Q. OK. Is there an assigned hearing officer whose duty it is to handle these third-step grievance hearings?

MR. RECKTENWALD: I'll object as vague and ambiguous.

THE WITNESS: At the time, it was the director of

* * *

[p. 61] A. Yes, it is.

Q. Has that previously been copied and turned over to anyone in connection with this lawsuit, as far as you know?

A. I think it has, yes.

Q. OK. Could I take a look at that for a second. I think it has, too. I just want to make sure.

MR. RECKTENWALD: Are you doing this pursuant to your subpoena?

MS. MOLLWAY: No. He's just used it to refresh his recollection.

MR. RECKTENWALD: He didn't use the whole file to refresh his recollection.

MS. MOLLWAY: No, Mr. Recktenwald. You can put your objection on the record. That's all you are entitled to.

Q. (By Ms. Mollway) Let me show you what I have marked as Exhibit 1 to your deposition, which is a letter dated July 15th, 1987, from Mr. Matsuzaki to Mr. Norris.

(Exhibit 1 was marked for identification.)

Q. (By Ms. Mollway) Could you please review that for me.

[p. 62] Have you ever seen that before?

A. Yes. It's in my file.

Q. When did you first see this?

A. On or about August 10th.

Q. Who showed it to you?

A. A file of Grant's was submitted to me to be processed through the third step of appeal.

Q. Do you remember who gave it to you?

A. Floyd Baptist.

Q. Let me show you what I will have marked as Exhibit 2.

(Exhibit 2 was marked for identification.)

Q. (By Ms. Mollway) Could you review that. And when you're done, let me know whether you've seen this before, these documents before.

A. Yes, I have.

Q. Did you receive this letter - that is, the first page of Exhibit 2 - on or around August 10, 1987?

A. I would correct my statements made at a previous question, that I was aware of this as of August 4th instead of August 10th.

Q. OK. You were aware of Exhibit 1 as of August 4th; isn't that correct?

[p. 63] A. No, I'm aware of this - I think a question was asked when I was aware of this, and I said around August 10th.

Q. OK. By "this," you mean Grant Norris's dispute with Hawaiian Airlines?

A. Yes. And I would state, then, to correct it to state that it was August 4th versus August 10th.

Q. And what are you basing that correction?

A. That it was the date that I received this, and that shows on the -

Q. Second page?

A. Yes, which is the third-step grievance form.

Q. The second page of Exhibit 2; is that correct?

A. Of Exhibit 2, yes.

Q. And is that your signature there?

A. Yes.

Q. Next to IAM Representative?

A. Yes.

Q. Going back to the earlier question, did you receive the first page on or about August 10?

A. August 4th.

Q. I'm sorry. The first page of Exhibit 2 is the letter dated August 10th, 1987, from Corey [p. 64] Moriyama -

A. Yes.

Q. - to you.

And my question is: Did you receive this first page of Exhibit 2 on or about August 10?

A. Probably August 11.

Q. OK. Also, just so the record is clear, Exhibit 2 is actually -

MR. RECKTENWALD: Various correspondence, different dates.

MS. MOLLWAY: Yes; correct.

Q. Can you look at the third page of Exhibit 2, which is a letter dated August 5th, to Corey Moriyama.

Is that your signature at the bottom?

A. Yes, it is.

Q. And did you send this letter to Mr. Moriyama?

A. Yes.

Q. Can you look at the next page, which has at the top "First Step Grievance Form."

Have you ever seen this before?

A. Yes.

Q. Do you remember about when you first saw this? Is that the August -

[p. 65] A. Along with the rest of the file.

Q. OK. In early August?

A. Yes.

Q. And do you recognize the signature at the bottom of this page?

A. Yes.

Q. Whose signature is that?

A. Floyd Baptist.

Q. Have you ever seen the next document that is part of Exhibit 2, which says "Base Management and Engineering, July 31, 1987, Suspension Hearing"? It's a two-page -

A. "Base Maintenance."

Q. What did I say?

A. "Base Management."

Q. I'm sorry. Base maintenance.

Have you ever seen this two-page document before?

A. Yes, I have.

Q. OK. Do you remember about when you saw it first?

A. With the file.

Q. OK. And that would have been around -

A. August 4th.

Q. August 4th. OK. Did you discuss the -

* * *

[p. 68] THE WITNESS: I should state that when a file is given to me, it would be like I'm giving it to you and saying, "I want this to be processed to the third step. Norman and Justin are at it again," you know. That's the context of - and I accepted the file and did what I was supposed to do as far as filling out the third-step form.

Q. (By Ms. Mollway) OK. I take it from this that you didn't really have a prolonged discussion about the actual activities that were involved?

A. No. I should state that this is one of many grievances that was, you know, presented to me.

Q. At any given time, you have dozens of files that you have to be responsible for; is that correct?

A. Yes.

Q. OK. When was the last time you spoke with Mr. Baptist about Mr. Norris, even if it was after the grievance proceeding?

A. We talked throughout.

Q. In the last month, have you and Mr. Baptist even -

A. Not about Grant Norris.

Q. Let me show you Exhibit 3 to the deposition, which is a letter dated September 10th, 1987, from Howard Ogden to Grant Norris.

[p. 69] (Exhibit 3 was marked for identification.)

Q. (By Ms. Mollway) Have you ever seen this letter before?

A. Yes, I have.

Q. OK. Now, you are listed as someone to receive a carbon copy at the bottom, but I notice that your name appears to be in different type.

Do you remember about when you received your copy of this letter?

A. I think it was on the 17th or - 17th of September.

Q. In other words, about a week after the date?

A. Yes.

Q. Did you have any indication that this letter even existed before you received it?

MR. RECKTENWALD: I'll object as vague and ambiguous.

THE WITNESS: I was not aware that this letter was sent out, and I wasn't aware of it.

Q. (By Ms. Mollway) OK. Did you have any discussion with Mr. Ogden about Mr. Norris?

A. No.

Q. Did you ever discuss this letter with Mr.

* * *

[p. 71] Q. OK. Let me show you what has been marked as Exhibit 4 to your deposition.

(Exhibit 4 was marked for identification.)

Q. (By Ms. Mollway) After you've read that, I'll ask you whether you recall receiving it.

A. I've read this.

Q. OK. When did you receive Exhibit 4?

A. On the 16th.

Q. OK. The first paragraph of Exhibit 4 says, "This is to follow up on your conversation today with Mary Ellen Sorensen pertaining to subject grievance hearings."

A. Uh-huh.

Q. Did you have a conversation with Mary Ellen Sorensen pertaining to subject grievance hearings?

A. I had a conversation with Mary Ellen about the scheduling of the grievance.

Q. OK.

A. And that was my discussions with Mary Ellen. It was not about the Grant Norris grievance itself.

Q. OK. In the course of discussing scheduling of the Grant Norris hearings, did anyone mention that Grant was being "reinstated"?

[p. 72] A. Yes.

Q. OK. Who mentioned that?

A. Hannah.

Q. Hannah. What is Hannah's last name?

A. I can't think of her last name.

Q. Do you know her position?

A. She was the secretary for Jean Sonoda.

Q. And who is Jean Sonoda?

A. At the time Jean Sonoda was the vice president of administration, or she was just on the - it might have been a time when she was either retired or resigned or was in the process of retiring from Hawaiian.

Q. And what was discussed between you and Hannah about Grant Norris's "reinstatement"?

A. I called in to find out if Grant's case was scheduled. Mary Ellen wasn't at the phone and Hannah answered. When Hannah answered, and I asked her that I was just trying to get a hold of Mary Ellen to find out if Steve had scheduled Grant's case. And at that point Hannah had mentioned that a letter was dispatched to Grant reinstating him and if I had received that letter, and I said no, I didn't.

Q. OK.

A. So then this letter was sent to me.

[p. 73] Q. And that's exhibit -

A. Exhibit 3. I wasn't even aware that their offer of reinstatement was in fact made to Grant. And at the time all I was trying to do was get a schedule.

Q. Yes, yes. So let me show you Exhibit 5, which may have crossed in the mail with some other earlier exhibits.

(Exhibit 5 was marked for identification.)

Q. (By Ms. Mollway) Let me first back up a little.

When did you - is it your signature on Exhibit 5, the first page?

A. Yes.

Q. OK. And did you send this letter around September 15?

A. Yes.

Q. At the time that you sent Exhibit 5, did you know about the reinstatement?

A. I don't think so. In fact, I didn't know.

Q. OK. So the earliest you could have learned about the reinstatement would have been after you wrote this letter dated September 15th, 1987; is that correct?

A. Yes.

[p. 74] Q. Let me show you what has been marked as Exhibit 6 to your deposition.

(Exhibit 6 was marked for identification.)

Q. (By Ms. Mollway) Please review that and then tell me whether you've ever seen this before.

A. I've seen it.

Q. OK. Can you remember when you first saw this? If it helps you to refer to your own file, which might have a notation, please feel free to do that.

A. Well, somehow I'm not sure if I've got this letter in my file. Yes, I have it.

Q. Can you tell from your copy when you received it?

A. October 2nd.

Q. While you got your file out, is there anything on your copy of Exhibit 3, which is this letter, that indicates when you received Exhibit 3?

A. Which is 3?

Q. This one.

A. September 10th?

Q. Yes. Can you tell when it was mailed to you?

A. It was mailed to me on the 17th.

* * *

[p. 82] the employee with a warning that any further instance or failure to perform the employee's duties in a

responsible manner would result in consideration of more severe disciplinary action?

MR. RECKTENWALD: If I can object, I'll object to the question. It lacks foundation and is vague and ambiguous and assumes facts not in evidence.

THE WITNESS: That is just industry standard.

Q. (By Ms. Mollway) You've seen letters like Exhibit 3 before?

A. Almost all letters with that paragraph.

Q. All reinstatement letters: is that what you mean?

A. All discipline letters.

Q. Do you have any understanding of whether you will be in Honolulu from March 27th through April 15th of this year?

A. I'll be out of Honolulu for an extensive period of time, during that slot that you just mentioned.

Q. OK. You are able to tell me at this time, if you know now when you will be out of town, I would appreciate it.

A. I know that first week of April that I'll be in Bozeman, Montana. The week of April 20th, I

* * *

—

EXHIBIT NO. 1

[LOGO]
HAWAIIAN
AIRLINES

/s/ Grant Morris 7/15/87
Letter Received - Date - Hand
Deliver Ltr.

July 15, 1987

Mr. Grant T. Norris
1125A 2nd Avenue, Apt. 4
Honolulu, HI 96816

Dear Sir:

This is to advise you that a hearing will be held on Friday, July 17, 1987 at 10:00 a.m. in the office of the Director of Base Maintenance, H. Honma. The charge is Group I - Violations - Reprimand to discharge; Item 8 - Insubordination, failure or refusal to obey instructions or perform work as required.

If you and your union representative is not agreeable to this date, feel free to contact me at x 237.

Respectfully,

/s/ N. Matsuzaki
N. Matsuzaki
Hearing Officer

NM:hpa

cc: H. Honma
H. E Ogden
IRD
IAM - Floyd Baptist
J. Chun

EXHIBIT NO. 2

[LOGO]
HAWAIIAN
AIRLINES

August 10, 1987

Mr. Samson Poomaihealani
Vice President-Hawaii
Airline Machinist District 141
International Association of Machinists
and Aerospace Workers
1449 S. Beretania Street
Honolulu, HI 96814

Dear Sam:

Re: Grievance No. M87-0005
Discharge of Grant T. Norris

Enclosed are two copies of the Step Three Grievance form on the above case.

Please advise when you would like to set a hearing date.

Sincerely,

/s/ Corey A. Moriyama
Corey A. Moriyama
Director
Industrial Relations

Encls.

[LOGO]

**Standard Grievance Report
PROCEDURE**

The Union shall complete and sign four (4) copies to be distributed to the appropriate Company Representative within fifteen (15) days from the Supervisor's written First Step answer. The Company Representative will sign and date those copies indicating receipt, and return two (2) copies to the Union.

(APPLICABLE STEP NO.) STEP NO. THREE (3)

GRIEVANCE NUMBER M87-0005

COMPANY ADDRESS CODE 532

EMPLOYEE'S NAME (TYPE OR PRINT)

Grant T. Norris

EMPLOYEE'S JOB CLASSIFICATION

A&P Aircraft Mechanic

(PREVIOUS STEP NO.)

Decision on Step No. ONE (1)

(DATE)

was received August 4, 1987

To the Company

Mr. Corey Moriyama

(NAME OF COMPANY OFFICIAL)

The decision rendered in Step No. ONE (1) of the grievance procedure is not satisfactory and appeal is hereby taken to the THIRD (3rd) step of the grievance procedure.

(NUMBER)

IAM Representative /s/ Samson Poomaihealani
(Signature)

Date August 5, 1987

Received by /s/ Corey Moriyama
(Company Representative)

Date 8/10/87

SGR Revised 11/1/86

[LOGO]

**Airline Machinists District 141
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS**

REPRESENTING
24,000 AIRLINE AND
AIRLINE SERVICE
COMPANY
EMPLOYEES

P. O. BOX 391
BURLINGAME,
CALIFORNIA 94010
TELEPHONE
(415) 342-3541

August 5, 1987

Mr. Corey Moriyama
Director-Industrial Relations
Hawaiian Airlines
1164 Bishop St.
Honolulu, Hawaii 96813

Re: Grant T. Norris
M87-0005

Dear Corey:

Enclosed are four copies of Step Three Standard Grievance Report Forms. Please sign and date these copies

indicating receipt and return two copies to me for my records.

I'm also sending you copies of the First Step grievance and the decision of that step.

Upon the return of my copies, signed and dated, I will contact your office to set a hearing date for this grievance.

Sincerely,

/s/ Samson Poomaihealani
Samson Poomaihealani
Vice President-Hawaii
Airline Machinist District 141

Enclosures

[LOGO]

First Step - Grievance Form

IAM - HAWAIIAN AIR

INSTRUCTIONS No. M87-0005

This form is to be completed by the Steward and/or Local Committee Representative and Supervisor and signed by the Complainant. Both the Union and Company shall receive a completed copy.

PART I - To be completed by Steward and/or Local Committee Representative and Employee.

EMPLOYEE'S:

Name Grant Timothy Norris Dept. 532

Shift Starting Time 9:00 PM

Employee No. 4063 Phone: Home 737-5360

Work _____

Seniority Date Feb. 2nd 1987

Classification A & P Aircraft Mechanic

Address 1125A 2nd Ave, Honolulu, Hawaii, 96816

Employee's Days Off (also dates) Wed. & Thurs.

I AUTHORIZE THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS TO REPRESENT ME IN ALL STAGES OF THE GRIEVANCE PROCEDURE IN PRESENTING AND SETTLING OF THE GRIEVANCE.

Grant T. Norris

Date Aug. 4th, 1987

Employee's Signature

COMPLAINT NATURE

Applicable Contract Provision(s) Article XV par G. Date of Claimed Violation 8/3/87

Remedy Sought To be reinstated with back pay and made whole

Supervisor First Contacted (name) Norman Matsuzski (date) 7/31/87

Date of Supervisor's Oral Answer see below

CASE FACTS (Give completed details including who, what, where, when, and why. Attach all records, forms, letters, or papers involved.)

Held out of service from 7/31/87

/s/ <u>Floyd H. Baptist</u>	<u>8/4/87</u>
Steward and/or Local Committee	Date
Representative's Signature	

[LOGO]
HAWAIIAN
AIRLINES

AUGUST 03, 2987 [sic]

BASE MAINTENANCE & ENGINEERING
JULY 31, 1987
SUSPENSION HEARING

A HEARING WAS HELD IN THE BASE MAINTENANCE
OFFICE JULY 31, 1987 AT 10:00 A.M.

REPRESENTING THE UNION: F. BAPTIST

RESPRESENTING [sic]
THE COMPANY:

J. CULAHARA

SUSPENDED EMPLOYEE: G. NORRIS -
DATE OF HIRE:
FEBRUARY 2, 1987

COMPANY OBSERVER: C. ROBINSON

THE HEARING OFFICER PRIOR TO THE START OF
THIS HEARING EMPHASIZED THE EMPLOYEE
REQUESTED THE LATE SCHEDULED TIME AS STATED
ON THE LETTER DATED JULY 15, 1987 NOTIFICATION
TO HIM.

QUESTION AT ISSUED [sic]:

EMPLOYEE'S REFUSAL TO SIGN WORK RECORDS
FOR WORK PERFORMED BY HIM; SUBSEQUENTLY,
SUSPENDED FOR INSUBORDINATION AFTER A
DIRECT ORDER WAS GIVEN TO DO SO.

POSITION OF UNION:

EMPLOYEE REFUSAL TO SIGN COMPANY WORK
RECORD BASED ON; HE FELT IT WAS UNSAFE FOR
WORK PERFORMED.

POSITION OF COMPANY:

THE COMPANY IS RESPONSIBLE FOR THE AIR-
WORTHINESS OF IT'S AIRCRAFT AND THE PER-
FORMANCE OF MAINTENANCE IN ACCORDANCE
WITH IT'S MANUAL, WHICH MUST ENSURE COM-
PLIANCE WITH THE FAR'S. ALSO, COMPETENT
PERSONNEL, MR. HENRY WONG, QUALITY CON-
TROL INSPECTOR, WHO IS TECHNICALLY QUALI-
FIED TO ANALYZE, JUDGE THE MERIT OF EACH
ITEM AND MAKE THE DECISION WHETHER OR
NOT TO SIGN THE ITEM OFF AS AIRWORTHY.

THE BASE MAINTENANCE LINE MANAGER, MR.
JUSTING CULAHARA, PERSONALLY OBSERVES
THIS WORK BEING DONE TO THE EXTENT NECES-
SARY TO INSURE THAT IT IS BEING DONE PROP-
ERLY. HE IS READILY AVAILABLE IN PERSON FOR
CONSULTATION. HE SEES ALL AIRCRAFT IN A
CONDITION SATISFACTORY TO INSPECTION SEC-
TION PRIOR TO RELEASE FOR FLIGHT.

IN THIS CASE, THE DECISION IN SIGNING A
WORK SHEET SIGNIFY ONLY ITEMS COVERED BY
HIS SIGNATURE. THIS WAS THE ONLY REQUISITE
IN THIS CASE. A DIRECT ORDER WAS GIVEN AND
HIS REFUSAL TO COMPLY BROUGHT ABOUT THIS
UNHAPPY SITUATION. MANAGEMENT HAS

NEVER MANDATED FOR A "SIGN OFF" FOR WORK NOT DONE BY AN INDIVIDUAL.

DECISION:

MR. GRANT NORRIS TERMINATED AS OF THIS DAY, AUGUST 3, 1987, FOR INSUBORDINATION.

/s/ Norman Matsuzaki
NORMAN MATSUZAKI
ASSISTANT DIRECTOR OF BASE MAINTENANCE
HEARING OFFICER
NM:hpa

cc: GRANT NORRIS
IRD
A.P. WELLS
H.E. OGDEN
C. ROBINSON
H. HONMA
IAM

[LOGO]
HAWAIIAN
AIRLINES

/s/ Grant Morris 7/15/87
Letter Received - Date - Hand
Deliver Ltr.

July 15, 1987

Mr. Grant T. Norris
1125A 2nd Avenue, Apt. 4
Honolulu, HI 96816

Dear Sir:

This is to advise you that a hearing will be held on Friday, July 17, 1987 at 10:00 a.m. in the office of the Director of Base Maintenance, H. Honma. The charge is

Group I - Violations - Reprimand to Discharge; item 8 - Insubordination, failure or refusal to obey instructions or perform work as required.

If you and your union representative is not agreeable to this date, feel free to contact me at x 237.

Respectfully,

/s/ N. Matsuzaki
Hearing Officer

NM:hpa

cc: H. Honma
H. E Ogden
IRD
IAM - Floyd Baptist
J. Chun

EXHIBIT NO. 3

[LOGO]
HAWAIIAN
AIRLINES

September 10, 1987

Mr. Grant T. Norris
1125-A 2nd Avenue, #4
Honolulu, HI 96816

Dear Mr. Norris:

I have reviewed your case file very carefully and, as the next appropriate individual in the chain of command, I have decided to mitigate the punishment imposed on you from discharge to suspension without pay for the period August 3, 1987 to September 15, 1987.

You are to report to duty on September 15, 1987 at 1930 hours.

This action being taken by me should not be interpreted by you as an indication that the Company condones your conduct. You are hereby warned that any further instance of failure to perform your duties in a responsible manner will result in consideration of more severe disciplinary action to include discharge.

Very truly yours,

/s/ Howard E. Ogden
Vice President
Maintenance And Engineering

cc: Personnel
Norman Matsuzaki
Samson Poomaihealani/IAM

EXHIBIT NO. 4

[LOGO]
HAWAIIAN
AIRLINES

September 14, 1987

Mr. Samson Po'omaihealani
IAMAW District Lodge 141
1449 South Beretania Street
Honolulu, Hawaii 96814

Re: 3rd Step Grievance Hearings
Enos, Palmer and Otoguru

Dear Sam:

This is to follow up on your conversation today with Mary Ellen Sorensen pertaining to subject grievance hearings.

First, please be advised that Grant Norris has been reinstated, which negates the need for a hearing at the third step. Second, October 5, 1987 is agreeable to me for scheduling the third step hearings for Gordon Palmer, Steven Otoguru and Fred Enos. It is my understanding that the Palmer/Otoguru grievances will be heard at 10:00 am with the Enos hearing to follow (at approximately 11:00 am).

In the event HAL does not have a new Director of Industrial Relations on board, we may want to request a delay as none of these cases involves a discharge.

In any case, all hearings will take place in the HAL conference room at 1164 Bishop Street, Suite 800. Your kokua is appreciated.

Sincerely,

/s/ Stephen R. Thompson
 Stephen R. Thompson
 Vice President-Administration
 and Counsel

cc: D. Glover
 B. Perry
 G. Fleming

EXHIBIT NO. 5

[LOGO]

**Airline Machinists District 141
 INTERNATIONAL ASSOCIATION OF MACHINISTS
 AND AEROSPACE WORKERS**

REPRESENTING
 24,000 AIRLINE AND
 AIRLINE SERVICE
 COMPANY
 EMPLOYEES

P. O. BOX 391
 BURLINGAME,
 CALIFORNIA 94010
 TELEPHONE
 (415) 342-3541

September, 15, 1987

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Grant T. Norris
 1125A 2nd Ave
 Honolulu, Hawaii 96816

Dear Sir and Brother;

Please be advised that the Third Step Appeal of your Grievance No. M87-0005, will be heard on Monday, September 28, 1987 at 1000 hours. The hearing will be held at the Carrier's Bishop Street Office.

Please contact me upon receipt of this notice to ensure that I have all of the pertinent information regarding your case. The phone number of my office is (808) 973-0141 and I'm located at 1449 S. Beretania St. your immediate response will be greatly appreciated.

Sincerely and Fraternally,

/s/ Samson Poomaihealani
 Vice President- Hawaii
 Airline Machinist District 141

cc: Floyd Baptist (3)
 File

EXHIBIT NO. 6

[LOGO]
HAWAIIAN
AIRLINES

September 28, 1987

Mr. Grant T. Norris
1126 N. AltaDena Dr.
Pasadena, CA 91107

Dear Mr. Norris,

I have received an official postal receipt indicating that you received my 10 September letter to you on 21 September 1987.

I must further advise you that the reinstatement offer made therein will be held until 2400, Friday 2 October 1987. If I do not receive a positive reply from you by that time, I shall consider that you do not desire to be reinstated.

Sincerely [sic],

/s/ Howard E. Ogden
Howard E. Ogden
Vice President
Maintenance & Engineering

cc: Personnel
J. Honma
C. Robinson

Copy: Samson Poomaihealani/IAM

[p. 1] IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.)	
HAWAIIAN AIRLINES, INC.,)	
Defendant.)	
<hr/>		
GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	89-2904-09
vs.)	
PAUL J. FINAZZO; HOWARD)	
E. OGDEN; HATSUO HONMA;)	
and DOES 1-50,)	
Defendants.	)	Volume 1
<hr/>		

DEPOSITION OF STEPHEN THOMPkins, ESQ.,

Taken on behalf of Plaintiff at the offices of Cades Schutte Fleming & Wright, 1000 Bishop Street, Honolulu, Hawaii, 96813, commencing at 9:16 a.m. on Friday, June 8, 1990.

REPORTED BY: JOAN IZUMIGAWA, CSR No. 136
Notary Public, State of Hawaii

[p. 4] * * *

STEPHEN THOMPkins, ESQ.,

Being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. BOYLE:

Q Would you state your name for the record, please.

A Yes. Stephen, S T E P H E N, middle initial R, last name Thompkins, T H O M P K I N S.

Q What is your residence address?

A 3169 Diamond Head Road, Honolulu, 96815.

Q And your business address?

A 1000 Bishop Street.

Q You work on the 9th – your offices are on the 9th floor?

A That's correct.

Q You've been there for, what?, a month, approximately?

A I would say approximately a month.

Q Prior to that you were – you maintained your offices at the 1164 address?

A That's correct. 1164 Bishop Street, Suite 800.

Q Have you ever had your deposition taken before?

A Yes.

* * *

[p. 38] Honma, and IAM. I ask you if this refreshes your recollection as to when you first heard about Mr. Norris or read about Mr. Norris.

A No. I would say that I had heard of an individual that was the subject of this action identified here as – how is it identified here? "Suspended Employee: Grant Norris." I had heard of the subject matter of this prior to the date of this letter.

Q Okay. Well, I believe we've been able to agree that Mr. Norris was asked to leave the premises, the base on the morning of July 15th. There's been some controversy between your attorneys and me as to what exactly he was told that morning and what legally you should call it, whether it's a suspension pending hearing or whatever it's called. He appears to have left the base on the morning of the 15th of July 1987 and has not worked at Hawaiian Airlines in any capacity since that time.

So using that day, that is, July – the morning of July 15, 1987, can you tell me if that refreshes your recollection as to when you first heard about Grant Norris.

A Well, it – it does place it within the general time frame.

And perhaps I'd better explain a little bit. [p. 39] Under our procedures, if there is an incident in the work place which is likely to result or may well result in some kind of disciplinary action, or in the event there's an incident where a supervisor deems it appropriate for an individual to leave the work place, we go through a procedure called holding out of service. When – when a – an employee is held out of service, essentially they are removed from the work place or asked to leave the work place, and they are somewhat in a limbo status at that point in time.

It would have been sometime within a few days after that, I would assume, that I would have been called by the supervisor involved, or the manager, and advised that we held an employee out of service. These were the circumstances, asking for guidance.

Q All right. Did you receive such a call from anyone in connection with Mr. Norris?

A I did. I received a call from - to the best of my recollection, from Mr. Norman Matsuzaki.

Q Again, was this a few days subsequent to July 15? I assume that you do not recall the exact date.

A I don't recall the exact date.

Q Sure.

A But if the incident - if he was removed on the 15th or held out of service on the 15th, you know, I -

* * *

[p. 79] THOMPkins

6/8/90

walk through and handle disciplinary procedures.

Q When you discussed the contract with Mr. Ogden, what exactly did you discuss, or can you recall?

A I can't recall.

Mr. Hipp: All right. In these conversations with Mr. Ogden, I'm going to instruct you not to answer any part of any conversation you had where you were developing your case for arbitration, if you were, with Mr. Ogden. I'm going to assert the attorney work product privilege as to any development of the case as opposed to providing personnel advice -

The Witness: Okay.

Mr. Hipp: - when you were a personnel - when you had your personnel hat on.

The Witness: Very well.

Q (By Mr. Boyle) Well, see, that's the difficulty I'm having here, because I - if you're providing answers to Norman Matsuzaki based upon - by the way, did you - when you discussed Mr. Matsuzaki's hypothetical with him -

A Mm-hm.

Q - did you discuss the contract at all, the collective bargaining agreement?

A I don't recall specifically, but I - I believe that I did point out to Norman that the labor agreement [p. 80] between the Iam and the employees represented by the Iam and the company did - does contain a specific provision that required Iam members that are represented within that bargaining unit to sign and document the work that they performed as A&p mechanics.

Q Were you telling that to him while you were wearing your personnel hat, or were you telling that to him as an attorney who had read a contract?

A No. That was as my - in my personnel function.

Q When do you cross the line when you were discussing a contract with a fellow employee of Hawaiian Airlines? In other words - let me withdraw that question. It's rather vague.

I take it that on several occasions, you've had the opportunity to discuss the collective bargaining agreement between Hawaiian Airlines and the Iam with fellow employees - managerial employees at Hawaiian Airlines. Is that a fair statement?

A I think it's a fair assumption, yes.

Q Can you tell me under what circumstances you are discussing - can you give me an idea of what constitutes legal advice about that contract, about that collective bargaining agreement, legal advice to Mr. Finazzo or someone else who - [p. 81]

A Mm-hm.

Q - wants to know if the company can take a certain action; and what constitutes advice in the area of human resources.

Mr. Hipp: I'll object to that question as vague and ambiguous as to "give me an idea."

Q (By Mr. Boyle) What's the criteria?

A Well, let me throw out a few examples. Certainly any time I would be advising management as to the labor agreement in connection with litigation that is in process.

Q There's a lawsuit filed?

A That's correct.

And as it pertains to an actual arbitration that - for which we are preparing or conducting that is actually in the arbitration procedure or pertaining to my development of the case for arbitration.

Other advice as to the general nature of the labor agreement, specific provisions of the labor agreement would be provided under my personnel function.

Q If someone goes to you in the company and they say, "We want to get rid of a non-" - strike that.

Let's go back to the example you just gave me, the arbitration. Do you have to be involved in the arbitration for it to - for your advice to be that of an [p. 82] attorney-client?

Mr. Hipp: I'll object to that as vague and ambiguous as to what the word "involved" means.

Q (By Mr. Boyle) Well, in other words, you've talked about preparing the company's case and representing the company and so forth and so on.

A Right, mm-hm.

Q Do you have to be actively involved in the day-to-day representation of the company for your advice to be covered by the attorney-client privilege?

Mr. Hipp: I'll object to that. That's incredibly vague and ambiguous as to "actively involved in the day-to-day operation." Of course this is - vague and ambiguous as to what "actively involved" means.

Mr. Boyle: Don't you want to speak for another half hour, Counsel, and coach him the way you do all your one of his manager was appropriate, that he take that action promptly to alleviate any hardship or to alleviate any potential back pay award as we worked our way through the grievance system.

Q Okay. But you don't say anything here about the starting of any processes for disciplinary action or termination or eventual termination, do you?

Mr. Hipp: I'll object.

A I don't have the document -

Mr. Hipp: The document will speak for itself, and Mr. Boyle has the document in front of him.

Mr. Boyle: Well, I'm sorry, Counsel. I thought that Mr. Thompson had read it.

A I read it, but I hadn't memorized it.

Q (By Mr. Boyle) Well, take a look specifically at the second sentence of that.

A All right.

Q Was there any doubt in your mind as of the time [p. 89] that that document - as of the time that that document was prepared by you that Mr. Norris had been terminated by the company?

A I think you need to understand, sir, that the - that the procedures at Hawaiian Airlines as contained in the labor agreement contemplate and provide for a fairly substantial process from the time an individual is held out of service up through the grievance procedure and through arbitration. And there - you know, use of the word "termination," you know, applies to the beginning of the process, and that's - that's what had occurred prior to the date of this piece of correspondence. And in fact, I believe that the matter was within the grievance process and in effect Mr. Norris was not at work at that time.

Q There's nothing in here about a grievance process, is there?

A Well, sir, if you'll give me back and let me look and see what it -

I know I discussed with Mr. Ogden the fact that there was a grievance process.

Q You talked about the grievance procedure?

A Yes, sir, that's correct.

Q You talked about the third step of the grievance procedure? [p. 90]

A Yes, sir. That does reflect that there's a grievance procedure in the process.

Q But the second sentence of the memo states rather emphatically that - virtually that there is no doubt that Mr. Matsuzaki had terminated Mr. Norris as of August 3, 1987.

A That's only the beginning of the procedure.

Q But that's not stated in the letter.

A Well, it is from the - I think you have to understand the grievance procedure in effect between the parties. There's no termination that is final until it's worked its way all through the grievance procedure that's initiated by the employee and the union. And a termination is not final until there's a final arbitrator's decision.

Q Yes, I understand that's the legal theory, but that's not what the letter says, is it?

A It's more than the legal theory. It's what the contract provides, sir.

Q But that's not what your letter says, and your letter was written to Mr. Ogden, right?

Mr. Hipp: I'll object to that. The letter speaks for itself. It also has reference to the grievance procedure, contrary to -

Q (By Mr. Boyle) And the letter also says that [p. 91] there is no doubt that Mr. Matsuzaki terminated Mr. Norris, does it not?

A That - it says that he was in fact terminated on August 3rd, 1987. That's the beginning of the procedure.

Q Okay. We're not talking about - when you wrote that letter - I mean, we're all going to be in front of the jury, hopefully, in a few weeks. There was no term of art with your use - strike that.

You weren't using a particular term of art when you used the term "terminate." were you?

Mr. Hipp: I'll object to that. That calls for pure speculation. He's already testified as to what the procedure is.

Q (By Mr. Boyle) I don't care what the procedure is. You used the term "terminate."

A Well, I think you have to understand what the procedure is. And you can't -

Q Did you use the term "terminate," Mr. Thompson?

A The letter speaks for itself, sir.

Q Thank you.

Did you regard termination to be a - excuse me. Did you regard termination to have been the punishment against Mr. Norris? [p. 92]

A I'm not sure I understand your question.

Q Well, you state in your second paragraph, "If it is appropriate to impose some punishment against Mr. Norris other than termination.

A Mm-hm.

Q I assume from that that your position was that Mr. Matsuzaki had imposed termination as the punishment for Mr. Norris's conduct. [p. 98]

Mr. Hipp: I'll object. The letter speaks for itself as to what is said in the letter.

A In effect, this goes to -

Mr. Boyle: Well, if that were true, Counsel, we wouldn't need judges to interpret the law, because there would be someone like you always to say that the decision speaks for itself. This man wrote the document and I'm trying to find out what he meant by the document.)

Mr. Hipp: That's the question you were responding to that you were cut off on.

A In essence, the answer to that question requires an explanation again of the grievance procedure.

From the time Mr. Norris was held out of service or covered by the provisions of the labor agreement between the International Association of Machinists representing the mechanics and Hawaiian Airlines, which provides for a multi-phase and multi-step grievance procedure; and

any action taken by Mr. Matsuzaki was the initiation of a multi-phase procedure under the grievance process; and that no action initiated by Mr. Matsuzaki which may be labeled a termination or otherwise is complete until such time as the final decision is rendered by an arbitrator as far as the case [p. 99] is processed.

Q (By Mr. Boyle) That assumes, doesn't it, that the person who has been disciplined is going to carry it on?

A Well, sir, it - it's clear from the memo - And that's what I'm trying to get to - that in fact it was being carried on. If I could see the exhibit that was presented to me, sir. It's clear that at this point in time, that the grievance process was initiated, and I have explained and - before as I've indicated in my discussions with Mr. Ogden that he is the vice president of that department, was in a position to review the actions in process, and make a decision on that case. And that is the purpose for the text of this - this document: encouraging Mr. Ogden to review the matter and determine what kind of action in the purview of his authority that was deemed appropriate, sir.

Q Was there a decision at the time this letter - at the time this letter was dictated, at the time this document was prepared, had there been a decision with respect to Mr. Norris's continued employment by Hawaiian Airlines?

Mr. Hipp: Object to that as vague and ambiguous as to the word "decision," which has multiple meanings. [p. 100]

Mr. Boyle: You can't be serious, Counsel.

Mr. Hipp: Well, he's described a process to you, Mr. Boyle.

Mr. Boyle: I know what he's described, Counsel.

Mr. Hipp: Your ignorance of the process does not excuse you in your asking of questions, although it may be an excuse for your questions.

Mr. Boyle: Oh, Lord. Oh, Lord.

A The position of Mr. Matsuzaki at his level was that termination was appropriate -

Q (By Mr. Boyle) Right.

A - for the conduct engaged in by Mr. Norris, but that's the only - only the beginning of a very lengthy procedure.

Q That was only the beginning if Mr. Norris continued to stay in that - what you have referred to as "process"?

A I'm not sure that - is that a question, sir?

Q The company had made a decision?

A That is not correct.

Q Mr. Matsuzaki had certainly made a decision.

A Only within the parameters of what his function was at that time, which is at the - the basic first step. [p. 101]

Q I don't understand your - you keep using this term "parameters," "only within the parameters." Mr.

Matsuzaki had terminated Mr. Norris's employment; is that not correct?

A He had initiated a process under the labor agreement in which he had, at the first step of the procedure, rendered his opinion and decision.

Q You know, I have looked - I have just heard your answer -

A Mm-hm.

Q - and I have looked at Mr. Matsuzaki's decision in all four corners of the document, and I see nothing about initiating a process. I do not see that word anywhere. I do see the word "terminate." I do not see anything about initiating processes or parameters or any of the other words you used in describing Mr. Matsuzaki's decision to terminate Grant Norris. Can you find those words for me in Mr. Matsuzaki's decision.

Mr. Hipp: I'll object to that as obviously vague and ambiguous, a speech by Mr. Boyle, and the document speaks for itself as to what words it contains.

A The fact is that the - the process was initiated by Mr. Matsuzaki's letter, and in fact a grievance was filed and pursued by the grievant in this case. [p. 102]

Q (By Mr. Boyle) Where does it say that in Mr. Matsuzaki's decision, Mr. Thompsons?

Mr. Hipp: I'll object to that as assuming facts not in evidence: that it has to say that in Mr. Matsuzaki's decision for that to be the case.

A In effect, under the procedures in existence at our company, this hearing is the first step in the grievance procedure.

Q (By Mr. Boyle) When - I'm not talking about the hearing. I'm talking about the decision.

A Well, the decision was -

Q It says - on Page 2 of the August 3, 1987, memo by Mr. Matsuzaki, it says "Decision. Mr. Grant Norris terminated as of this date, August 3, 1987, for insubordination."

A Okay.

Q Is that what you - is that statement by Mr. Matsuzaki what you refer to as initiating the process?

A That's correct.

Q May I have your letter back.

A Yes, sir.

Q What did you mean when you used the term "whether or not we" - or the phrase "whether or not we wish to sustain the action of Mr. Matsuzaki"? You mean uphold his decision? [p. 103]

A I would think that means the same, yes.

Q As of August 17, 1987, did you agree or disagree with the decision by Mr. Matsuzaki?

A I did neither.

Q You didn't have an opinion about it one way or another?

A No, I did not.

Q You – the reason I ask you that question is that you state in the third paragraph, "I am aware that you feel it would violate one or both of the privileges.

A That's correct.

Q You know, it's my understanding that – strike that.

Why did you send a memo to Mr. Ogden in the first place?

A I don't recall specifically whether I couldn't reach him on the phone or what – the specific reason why it was placed in a memo form.

Q Well, to some extent was this memo to put down what – or to – I guess the term is used "to memorialize." I do not like that term. But was one of the reasons that you dictated this memo to Howard Ogden to set forth what your opinions were with respect to the wisdom of the action, Mr. Matsuzaki's actions?

A No, that's not correct.

Q As you sit here today, can you think of – do you have either generally or specifically any recollection of why you dictated this memo to Mr. Ogden?

A Generally it would have been to encourage him to review the matter and be cognizant of the fact that he is the vice president of that department, had the responsibility of reviewing it and making a determination [p. 106] as to the company's course of action at that point pursuant to the labor agreement.

Q At this point were you aware of whether or not Mr. Norris had gone to the Federal Aviation Administration?

A No.

Q At this point in time, were you aware of whether or not any other employees had gone to the Federal Aviation Administration?

A No.

Q In your position either as personnel – in your position in Ird or as counsel, did you have as of August 17, 1987 the power to overrule a decision made by Mr. Matsuzaki?

A No.

Q As of August 17th, 1987, did Mr. Ogden have the power to overrule a decision made by Mr. Matsuzaki?

A Yes.

Q Is there any reason why you communicated on August 17, 1987, with Mr. Ogden as opposed to Mr. Matsuzaki?

A Well, because it was in the grievance process and Mr. Ogden is the – the person to review any initial decision made by Mr. Matsuzaki.

Q You state here by the way, is there a [p. 107] difference between a termination of employment and a suspension without pay for a period of time?

A Yes.

Q Were you suggesting in this memo to Mr. Ogden that you were not of the opinion that Mr. Matsuzaki's

order of termination of employment was appropriate under the circumstances?

A Sir, I'm sorry. There's a double negative there, and I - you said something about "not," and I - could you rephrase the question, perhaps, and help me a little bit.

Q Okay. I'm sorry if I misstated the question - or rather, misspoke.

As of August 17, 1987, when you sent this memo to Mr. Ogden, were you of the opinion that Mr. Matsuzaki's order terminating the employment of Grant Norris was inappropriate under the circumstances?

A I had no opinion at that point.

Q Again, I'm not attempting to argue with you, but if you had no opinion at that point, why did you tell Mr. Ogden that inviting - you appear to invite him to confer with you - well, strike that.

In the third paragraph you state, "I am aware that other problems exist pertaining to this case, however I would suggest that we review the case file and [p. 108] if it appears that some disciplinary action other than termination is appropriate that you take prompt action to modify Mr. Matsuzaki's order," and then it goes on.

A Mm-hm.

Q You seem here to have been suggesting that Mr. Matsuzaki - Mr. Ogden confer with you about the - possibly overturning Mr. Matsuzaki's decision.

A No, I don't think that was my suggestion, sir. I think my suggestion is that he, in performance of his

functions as the vice president of maintenance under the grievance process, review this, as he would be expected to do in any case, and review the process as it had gone on to that point and make his own independent decisions as to what course of action was appropriate; recognizing that that, from my perspective, is what the grievance process is all about at Hawaiian Airlines and why we provide for a several-step process where any action taken by an individual in the company pertaining to an employee can be reviewed by different individuals from a different perspective in determining what the final action should be.

And that's the reason why this is essentially a personnel function letter. It - it is advisory to Mr. Ogden from the personnel standpoint and the Ird standpoint as to the functions that he is expected to [p. 109] perform in his position.

Q But why should this - well, strike that.

Did you have any other personnel problems going on at the time?

A Oh, I don't recall, sir.

Mr. Hipp: It's time for lunch.

Mr. Boyle: So it is. (Recessed for lunch: 12:08 p.m.)

* * *

[p. 110] (Resumed: 1:26 p. m.)

Q (By Mr. Boyle) Did Mr. Ogden ever get back to you with respect to taking another disciplinary action other than termination?

Mr. Hipp: I'll object to that as vague and ambiguous.

A Certainly, sir, at some point in time I saw his decision letter, if that's -

Q (By Mr. Boyle) What decision letter?

A - what you're referring to. Mr. Ogden, I believe, at some juncture did issue a letter to the grievant indicating that he had taken the matter under consideration and mitigated the action that had been taken.

Q What was the genesis of that letter?

A When you say "the genesis," can you explain that for me, please.

Q What was the origin of the letter? Was the letter your idea, Mr. Thompkins?

Mr. Hipp: I'll object to that. Assuming facts not in evidence.

Mr. Boyle: "Was the letter not your idea"? How could that assume a state of facts not in evidence?

Mr. Hipp: You asked what the genesis of the letter was. You didn't establish that he knew what the [p. 111] genesis of the letter was.

Mr. Boyle: No. He had already asked me what I meant by the term "genesis," which I thought was a book in the Old Testament.

In any event, let's read back my question. This can take, Counsel - both counsel, as long as you wish to take.

(The last question was read by the reporter.)

Mr. Hipp: I'll object to that as a compound question.

Mr. Boyle: It's not a compound question. It couldn't possibly be a compound question.

Mr. Hipp: Two different questions.

Mr. Boyle: That's not a compound question. You ought to learn your objections. You ought to stay in either labor law or practice litigation, because -

Q (By Mr. Boyle) In any event, what was the origin of Mr. Ogden's letter, if you know?

A Only by what I recall from seeing on the letter itself. I believe it was a letter signed by Mr. Howard Ogden.

Q I know it was signed by Mr. Ogden. Was it prepared by Mr. Ogden?

A I'm afraid I don't know.

Q You don't know - you have no idea who prepared [p. 112] that letter for Mr. Ogden's signature?

A I do not know. I would assume Mr. Ogden may have - he signed it so I assume he prepared it, but I don't know.

Q Did you have any discussion with Mr. Ogden prior to that letter being sent?

A I had several discussions with Mr. Ogden, as I previously testified to.

Q Okay. Fine. But between - what letter, first of all, are we referring to? Are you referring to the letter which

- I believe it's dated September 10, 1987, to Mr. Norris from Mr. Ogden. At least it appears to have been signed by Mr. Ogden.

A Yes, that's the letter to which I refer.

Q Okay. May I have that back.

Your memo to Mr. Ogden dated August 17, 1987, asks Mr. Ogden to get back to you at his earliest - what the initial item is appears to be - I - I just can't read the numbers at the bottom.

Then on the right-hand side it says, "Mary Ellen - Check with S. T. Friday a. m. if decision made. Must let Ray Sakai know. M. W."

Q May I have that back?

A Yes, sir.

Q Thank you.

Do you recall what the decision was by the Hawaii state unemployment division on Grant Norris's claim for unemployment benefits?

A I don't recall the text of their decision, no, I don't.

Q Do you recall generally what the decision found?

A I think that he had applied for unemployment compensation, and essentially my recollection is that it was determined in his favor. But the text of it I don't recall.

Q Did you have any communications with Mr. Ogden [p. 121] between Thompkins 1 and Thompkins 2?

A Well, let me see Thompkins 1 and Thompkins 2, if I may.

Sir, I don't know.

Q Why were you asking Mr. Ogden - you appear to be asking Mr. Ogden - you state in this memo, "we will need a decision as to what position Ha will take," Hawaiian Airlines will take. Why were you asking Mr. Ogden for such a decision?

A Okay. Essentially, as I've stated earlier, within the procedure we have at Hawaiian Airlines, an action that is initiated, such as in this case, by Mr. Matsuzaki, is not a final action until it goes through the entire process. And the question which I was asking of Mr. Ogden is whether -

Q Are we - I'm sorry.

A - or not he had made a decision as yet at his level of review of the action initiated by Mr. Matsuzaki pertaining to Grant Norris, because that information I felt would be relevant for submission one way or the other to the Department of Labor.

Mr. Boyle: Let me have this marked next in order.

(Exhibit 3 was marked for identification.)

[p. 122] Q (By Mr. Boyle) Can you take a look at Mr. Ogden's letter which has been marked as Thompkins 3.

A The first page of this, yes, sir. I have.

Q Okay.

Mr. Hipp: Why don't you look at the second page.

A Yes, sir.

Q (By Mr. Boyle) Between the date of Thompkins 2, which is September 1, 1987 and the date of Thompkins 3, September 10th, 1987, received in the administration department on, it appears to be, September 11th, 1987 - can you tell me whether or not you can tell if it was received on September 11th or not.

A I can't tell from this stamp for sure because that - the reproduction doesn't appear to be very good with that.

Q Right.

A But from the entire text of the document, including a stamp at the lower right-hand side reflecting a date September 12th, it would appear that in all probability it was received by the administration department on September 11.

Q Okay. Now, between September 1st and September 11th did you have any communication with anyone regarding [p. 123] the Norris matter?

A Oh, yes. I did.

Q Who did you have communications with?

A Sam Poomaihealani - That's P O mark OMAIHELANI - who is the union contact at my level. And Sam, I believe, inquired of me on at least one occasion, if not more than one, as to whether or not any - the action taken involving Mr. Norris would be mitigated or whether - what the company's position was going to be. I do recall calls from Sam to that effect.

Q Well, first of all, let me try and break this down -

A Okay, sir.

Q - in an orderly fashion. How many calls did you have - or rather, how many communications did you have with Sam Poomaihealani between the 1st and the 14th of September 1987?

A Well, I'm - okay. I - I know I received communications from Sam. Now, whether or not - what was - between September 1st and September - did you say the 10th?

Q Excuse me. The 11th.

A Okay.

Q I'm just trying to understand who you spoke to.

A I understand, but within that parameters I [p. 124]

Q How was this filed? Strike that.

This letter - oh, I know where this came from. Oh, okay.

Down at the bottom it says, "9/25/87. Per S. Thompkins asked N. Matsuzaki or H. Ogden through Helen" [p. 128] - "Helen," is it, or "Helene"?

A Let me, if I may, look at it and see the text.

Q Yes.

A Okay. This appears to be - it's a typewritten entry bearing the date 9/25/87. It's not a signed document, but it purports to have been typed in here by Marge Warren,

again the director of personnel. And it appears to be a memo of actions taken by Mrs. Warren at my request in essence asking that she contact either Norman or Howard through Helen, which should be "Helene" - It's a secretary, I would assume - through Helene in maintenance asking that they - they go ahead and write to Mr. Norris via regular mail and telling him that the company had received the return receipt showing that he had received the decision letter and advising him that Hawaiian would hold his position open until October 2nd - And that was - appears to be a little bit variable, depending on when the letter that was being requested went out - and then advising that - Mr. Norris that if we didn't hear from him, we assumed that he wasn't really interested in the position.

Q On the - strike that.

Did you ever discuss following your receipt of this letter - and I may have asked you this question. If I did, I apologize. But did you ever discuss the [p. 129] contents of this letter with Mr. Ogden?

Mr. Hipp: I assume you're referring to the September 10th letter, not the second page of Exhibit 3.

Mr. Boyle: Yes. The September 10th letter.

Q (By Mr. Boyle) Did you ever discuss the September 10th letter with Mr. Ogden?

A I have no recollection of specifically discussing the September 10th letter with Mr. Ogden.

You mean prior to the time he issued it? Other than -

Q No, no, no. I mean - as I understand your testimony, you had no communications with - or excuse me. You did not have any discussion with Mr. Ogden about the letter of September 10, 1987, prior to the time he actually signed it and sent it out.

A Not - not the letter, but in my overall discussions with Howard, again, I advised him of the full grievance procedure, would have advised him of the standard procedures that we utilized. I would have advised him of formats for decision letters or action letters or where to get those.

Q Well, specifically I'm - I'm curious about the language in the third paragraph of the letter that states, "This action being taken by me should not be interpreted by you as an indication that the Company [p. 130] condones your conduct. You are hereby warned that any further instance of failure to perform your duties in a responsible manner will result in consideration of more severe disciplinary action to include discharge."

A Okay, sir.

Q Did you ever discuss that language with Mr. Ogden or anybody else?

A As applies to this specific letter, I have no recollection. However, that's boilerplate language that is included in almost all, if not all, disciplinary action letters which are other than termination letters. And I would have discussed that with the union in the past. I would have discussed that with essentially any company individuals involved in any grievance process. That's a standard boilerplate letter - language.

Q When you say "standard boilerplate," just remember that the people - your deposition or portions of your deposition may be read to the jury.

A I understand.

Q The language I'm referring to is the paragraph - the third paragraph. I've already read it into the record. When you say that is standard boilerplate language, what do you mean "boilerplate language," Mr. Thompson?

A In essence, any time the - Hawaiian Airlines [p. 131] takes an action, other than a termination for cause, involving an employee misconduct or employee conduct or whatever it may be, the letters do contain a caution to the employee advising them that, "Simply because the company has decided to do something other than terminate you for an offense which ordinarily would entitle the company to - to terminate or consider terminating you," the fact that the company takes some more lenient action shouldn't be construed by the recipient of the correspondence as being condoning of any conduct which is improper or a violation of the regulations. And as a caution to them, that any misconduct in the future would provide a basis for the company considering more serious types of disciplinary action up to and including separation from employment for cause. And that's part of the graduated procedure: providing notice to any recipient of this kind of correspondence that they must watch their conduct in the future.

Q Whether it's the same misconduct or different misconduct, the company will be -

A Well, will have to consider the fact that there is a prior disciplinary action in the record in determining what kind of action is appropriate for future instances of misconduct.

I think that, if I may, has developed, at least [p. 132] in our context, over a long relationship of union-management relations where the union, of course, encourages the company to make sure employees are fully aware of where they stand and what the perils are for future misconduct so it isn't a surprise to anybody if there is any future malfeasance or misconduct.

Q You appear to have gotten involved in this matter to the extent of asking - strike that.

Following your receipt of this letter on September 11, 1987, did you have any discussions with Mr. Matsuzaki or Mr. Ogden about Mr. Ogden's letter?

A I have vague recollections of calling their office - I don't recall with whom I may have talked, whether it would have been - it probably would have been Mr. Ogden - and suggesting that since the time frame set for Mr. Norris to return to work had passed without us having received any communication, that that would probably need to be extended until we were sure that he knew that he was to come back to work.

Q Well, as you saw, Marge Warren put a notation in here on September 25, 1987.

A I would think, sir, my communication would have been prior to that because I - I - my recollection - And again, it's a vague recollection - is that I called and said, "Well, that's a date in here, and we - have [p. 133]

you received back the certified mail return receipt yet? And if you haven't, if you're able to locate him, then you - you ought to extend the period of time in which he would have an option of returning for his return."

And then the - the comments to Mrs. Warren - from Mrs. Warren were probably to the effect "Now you've got it. You know when he got it. Let's give him - you know, go back to him with some communication and let him know that, you know, the return is still open to him."

Q After Mr. Ogden - can you tell me why you were involved in this matter at all after Mr. Ogden had sent

* * *

[p. 137] Mr. Boyle: That you are not going to do that at the time of trial, correct, Counsel?

Mr. Hipp: Yes, that's correct.

Mr. Boyle: Thank you.

Q (By Mr. Boyle) Taking these documents in order, I'd now like to show you correspondence - what appears to be a copy of correspondence from you to Mr. Poomaihealani. It's dated September 14, 1987. I'd like to ask the court reporter to mark this and then I would like to ask you, Mr. Thompkins, to review it.

(Exhibit 4 was marked for identification.)

Mr. Boyle: While you're doing that, we'll take a 1-minute break.

(Recess: 2: 18 p. m. to 2: 21 p. m.)

Q (By Mr. Boyle) Who is Mary Ellen Sorensen?

A Mary Ellen Sorensen is my secretary, one of my secretaries.

Q Apparently Mr. Poomaihealani called you on September 14th, 1987?

[p. 138] Mr. Hipp: Could you give him the document.

A It would appear so, yes.

Q (By Mr. Boyle) He spoke to your secretary?

A Yes. Mrs. Sorensen.

Q Did he speak to you?

A Not to my recollection, but I don't recall specifically.

Q What was the purpose of your sending Mr. Poomaihealani that letter?

A The letter refers to the scheduling of third step hearings involving grievances that were pending, and it would have been to confirm with Mr. Poomaihealani that it was permissible to establish a third step hearing for three individuals on October 5th at 10: 00 o'clock with a second - with two of them at 10: 00 and one at 11: 00. It advises him that Grant Norris was reinstated ; and the fact that insofar as the termination third step hearing, that that would not be necessary as a result of the reinstatement ; and advises him that apparently a new director of industrial relations wasn't on board at that time, and as none of the cases that we had at that time involved any discharge, that it would - it would be - the company may want to request a delay.

Q What is the termination third step hearing?

A I'm sorry, sir?

[p. 139] Q What is the termination third step hearing? I thought you used that term.

A A third step hearing is - exists within the grievance procedure of Hawaiian Airlines for any and all kinds of grievances which come up involving employees and the company. A third step termination hearing would be in a case involving an actual termination that was going to be heard at the third step in regard to the termination. And it just really is - is a third step hearing involving a case in which termination was an issue.

Q Well, let's assume for a moment that Mr. Norris had gone through that third step. What would it have involved?

A A third step hearing would involve a hearing before the vice president of the department concerned or the director of industrial relations -

Q Okay. Let's - let me go through this. We have the hearing at which Mr. Matsuzaki presided as the hearings officer.

A That's correct.

Q Assuming that Mr. Norris stayed in what you have repeatedly referred to here today as the process, there would have been a third step hearing?

A That's correct.

[p. 140] Q Okay. What would the third step hearing have entailed?

A Well, by procedure there would have been a third step hearing officer, which in the case involving Mr. Norris would have been Howard Ogden, at which time the company would have made a presentation as to the actions it had taken and introduced individuals to explain the actions that they had taken and what they had observed or the substance of the - the facts and circumstances surrounding the incident which gave rise to a disciplinary action.

The union would present its basic verbal position as to what the union posture was and what the grievant felt about the situation, and they have the opportunity to present anyone that they want.

These are non-adversarial proceedings. There's no sworn testimony. It's a get-together with a different authority than - than the person making the initial decision and in this case would have been at the third step.

Q What's the first step?

A First step is basically a meeting or, if you wish, a hearing involving the action individual, the person who is taking the initial action. Oftentimes it will be the supervisor or someone directly in the chain [p. 141] of command, if you want to use the chain of command, but it - term, but someone in the hierarchy in a direct supervisory relationship to the individual involved.

Q Does there always have to be a first step?

A A first step, yes, as - as - of some form and substance, whether or not it's sitting down in a formal environment or in a meeting room. It does not necessarily

have to approach that kind of formality, but yes, there has to be a first step.

Q To your knowledge, was there a first step in the Norris matter?

A To my knowledge, the union considered Mr. Matsuzaki's meeting with - with Grant Norris as the first step.

Q What meeting are we talking about?

A The one - I believe it was July 31st. Perhaps the 15th. You - if I could.

Q Yes, please. If you could, I -

A I think you have -

Q Do you want to take a look at this?

A I guess it's not - it's that letter which is date - has a date of August 3rd relating to a July 31st, quote, unquote, suspension hearing.

Q Was the July 31st suspension hearing the first step or second step?

[p. 142] A First step.

Q What was the second step?

A Second step is, in this particular instance, jumped by the union to go to the third step.

Q What would have been - well, why was there a jump, if you know?

A In a case involving, as in Norris's - Mr. Norris's case, a termination allegation, the -

Q You mean a termination decision?

A Well, a position by the union the employee has been terminated from his employment or is entering the process to effect his removal from the employment relationship with the employer. Under our labor agreement they have the right to bypass the second step and go directly to the third step.

Q Okay. I think you indicated - in describing the third step, you stated that there would be a third step hearing officer, and you basically set forth the procedure whereby the company would have a chance to present its position and the employee, through the union, I take it, would have a chance to present his or her position?

A That's correct.

Q The meeting would be presided over by Mr. Ogden?

[p. 143] A That's correct.

Q Your letter, if I understand it correctly - and please correct me if I'm wrong. Your letter to Mr. Poomaihealani was basically saying that Mr. Ogden's letter had negated the necessity of a third step because the hearings officer had already offered reinstatement to the employee?

A As a termination hearing, certainly. I think that - that it would be appropriate to keep in mind what I've indicated earlier, is that Mr. Poomaihealani, to my recollection - as we do in most cases involving the initiation of a procedure that could lead to an eventual permanent loss of a person's position, the union's general goal and - from my perspective is to try to get the person back to

work. And that is - that is what the union really was requesting: Can we get this guy back to work as quick as we can.

And the action which was taken by Mr. Ogden was not a third step decision. It was an action taken by virtue of his authority as the vice president to mitigate the action taken by Mr. Matsuzaki to a suspension. So from that perspective, we no longer had a discharge case that we were dealing with in the grievance process.

Q As far as -

A And under - I'm sorry.

[p. 144] Q No, I'm sorry.

A Under our - okay. Under our process the individual still has the right under our labor agreement to proceed in any fashion that he deems appropriate through his union or through his union representative: proceeding ahead, or pushing forward from Mr. Ogden's decision if the grievant or the union were unwilling to accept that and wanted to push it forward, or to grieve the decision of Mr. Ogden. They have all kinds of make - whole remedies within the grievance process itself, which include restoration of seniority, restoration of employment, back pay. Practically anything you can think of, really.

Q All right. Now, what would have been - let's assume for the moment that Mr. Ogden had sustained Mr. Matsuzaki's action at the third step. What would be the next step by which the grievant would proceed?

A Well, it would be to provide the company with notification that the action taken by the third step hearing

officer in the third step hearing was unacceptable and that they wished to proceed to arbitration, and an arbitrator would be selected and we would then proceed through the arbitration process.

Q What is involved in the arbitration process?

A Well, selection of a neutral.

[p. 145] Q By whom?

A By the union and management.

Q Does the union and management get - do the union and management get together and select one person, or do they each select a person who selects a third - who together select a third person?

A There are any number of options available on the selection of a neutral. In the circumstances we have, generally the union makes a request for one arbitrator, and unless for some reason that is unacceptable to the company, we generally abide by the union's request on who they want to serve as an arbitrator.

In the event we were unable to reach a satisfactory agreement, there are any number of ways in which that issue can be resolved. If - if the company - the union were to proffer somebody that was unacceptable and management were to proffer somebody unacceptable to the union, then there are numerous ways in which both individuals who have proffered could sit together and select a third. It is strictly an issue that is left to the discretion of the parties, on selection of the independent neutral. We have never had a problem with - between the union and management selecting a neutral since I've been with the company.

[p. 146] Q Arbitration involves what?

A You mean the nuts and bolts of an arbitration?

Q I'm just trying to get an idea of how the system – the process that you've repeatedly described here today, how it works.

A Mm-hm.

Q We've now gone through the hypothetical situation. We've passed the third step. Mr. Ogden has sustained Mr. Matsuzaki's decision terminating Mr. Norris. I'd like to find out what is involved in the arbitration.

A Generally speaking, the union would prepare a position paper involving the issues, setting out the issues as they perceive them to be, setting out the position of the union on those issues, setting out the position of the company as they understand it to be on those issues, and including their prayer for relief to the arbitrator.

Q Does the company prepare a similar position paper?

A It has the right to prepare a similar position paper. If it has no – no challenge to the issue as presented by the union or to any of the – the facts as presented by the union, it may elect to just proceed on that basis. Or it may submit at any time its own [p. 147] position of – on the issue to be decided by the neutral.

And – and then, of course, there is an arbitration hearing in which the contract provides there may be a court reporter present. The witnesses are sworn and the

cases of the respective sides are presented. And the arbitrator acts with essentially unfettered discretion in determining what kind of remedy is available. He has the full ambit of remedies available to him: restoration for duty, full back pay, supporting the company's position, modifying that action in some way that he deems appropriate.

Q I see. So let's discuss that. Let's get into the remedies. The remedies available to the arbitrator for use in a particular instance would run from sustaining the action of the company and management personnel – which would be one possibility, correct?

A Yes.

Q It could go back – it could reinstate the grievant with or without back pay?

A That's correct.

Q It could restore any loss of privileges that had been occasioned by the discharge?

A That's correct.

Q When you say "unfettered discretion," you mean that literally, I take it?

[p. 148] A Other – you know, within the terms of contractual agreement between the parties. He's guided by the contract.

Q The contract does not provide for anything in terms of remedies apart from, say, reinstatement with back pay and no loss of rights and privileges?

A I'm not sure I understand your question, I'm sorry.

Mr. Hipp: I'll object to that. The contract will speak for itself as to what it provides.

Q (By Mr. Boyle) Is that a fair statement?

A I'm sorry. You'll have to repeat your - what Ken is saying or what you've - you'd have to repeat your question.

Q No, I'm just asking you: Is that a fair statement, that the contract -

A That the contract speaks for itself?

Q No, not that - I recognize contracts speak for themselves. That's why thousands and thousands of lawyers have graduated each year: to interpret them.

But in any event, are all of the remedies for the grievant spelled out in the contract between the airline and - Hawaiian and the Iam [sic]?

A No, I don't believe they are, not all the remedies.

[p. 149] Q Well, I'm talking about - well, when you say "unfettered discretion," I'm just trying to get an idea of what the arbitrator can do for the grievant if the arbitrator determines that the company was in the wrong and that the company should not have, for example, discharged the employee.

A The arbitrator has the right to restore the employee to duty with full back pay, he has the right to restore any seniority that the individual may have lost as a result of the company's actions, essentially has a right to order the records expunged from the file, to name a few. Those were probably the principal actions that an

arbitrator would commonly consider or have available to him in the event he felt the action of the company was not sustainable.

Q For the employee that is reinstated with full back pay, what sort of protection is afforded the individual from the retaliation of supervisors?

A That's assuming that there would be some potential for retaliation. I'm not - I'm not quite sure I understand what you're - what you're asking me. An individual has the right to be secure from retaliation by any individual as a result of being restored to duty based upon an arbitrator's decision.

Q Well, I guess - you know, there's no secret to [p. 150] where we're going. You've been with the company 5 years. Have you ever seen a situation where an employee was restored to his or her position pursuant to this process that you've described -

A Sure.

Q - and a supervisor attempted to visit some sort of retaliation on that employee?

A I've not seen that happen, sir.

Q You have not seen that?

A I have not seen that happen. I can candidly state that the advice that the company - from the Ird [sic] and the personnel department's posture is, and time there is a restoration to duty, whether it be by mitigation or by arbiter's decision, that the department is advised that that is a decision of an independent arbiter and is to be accepted in good grace by all employees affected.

Q Did you ever hear any - strike that.

I'd like to show you a document that's been marked in - already been marked in other depositions, but I'd like to have it marked here and I'd like to ask you to take a look at it. First let her mark it and then I'd like you to review it.

A Okay.

Q It's the change of status form that I'm certain you're aware of.

[p. 151] A Mm-hm.

(Ms. Mollway entered the deposition.)

(Exhibit 5 was marked for identification.)

A Very well.

Q You've seen that before?

A Yes, sir, I sure have. Well, I've seen this form. Whether or not I've seen this exact one I'm not sure, but -

Q Okay. Well, I'd like to direct your attention to halfway through the middle of the page. It says, "Employment re-instated per Mr. Steve Thompkins Office." That confused me. Do you know what they're referring to there?

A I - I really don't know who prepared this particular document. Generally speaking, any time - this is what we call a Hal 76, and it's a notification of change form. Any time there's any action resulting in an adjustment of an employee's status with the company, there is a Hal 76 form, which is an administrative form, which - using a

term you said you don't like, which really memorializes what has happened with the individual.

And this document then is used as a basis for the - the computer input on the salary, as the document [p. 152] for recording in the personnel file as to what has happened with that particular individual. It's not an action document as such. It's a - it's an administrative fill-in-the-blank type thing.

Now, what - if - if the personnel office was aware of an action being taken pertaining to an employee that required a Hal 76, this particular document, then they ordinarily would call out to the department, saying, "You know, I understand such-and-such has happened with an employee. We haven't yet received your Hal 76. You need to get it in so that we can put it in the file."

Q Well, the only thing that I'm curious about is that as I understand it from your testimony, Mr. Norris's employment was reinstated per Mr. Ogden's letter.

A That's correct. That's the action document.

Q And I understand this document wasn't prepared by you, but this document states, "Employment re-instated per Mr. Steve Thompkins Office."

A Okay. Mr. Ogden's letter is the action letter, sir. This document - again, under my purview within my departments includes all the personnel area. And the clerks in my department, having seen a letter such as the action letter of Mr. Ogden pertaining to Grant Norris, would oftentimes call to the secretaries of those departments involved and say, "I don't know if you've [p. 153] seen it or not, but, you know, in this case Grant Norris

* * *

[p. 218] Q Do you know what his background is in airlines?

A I do not know.

Q Do you know what his background is, period?

A I do know that he has extensive travel industry experience. However, I can't specifically speak to -

Q Airline background?

A His airline background, yes.

Q Okay. What about Mr. Talbot? Does Mr. Talbot maintain a permanent residence here?

A Yes, he does.

Q The next document we looked at was Exhibit 9. What was the genesis of Exhibit 9?

A Exhibit 9 is a settlement agreement involving the Federal Aviation Authority and Hawaiian Airlines.

Q Yes, I know what it is. I was asking you what the genesis was. I understand, for example -

A Okay.

Q - that you - do you know what "genesis" is?

A Yes, I do.

Q Okay. Can you tell me what the genesis is of that document.

A The fact that there were certain disagreements between the Federal Aviation Authority and Hawaiian Airlines which had been outstanding. And in discussions,

mutual discussions between the Federal Aviation Authority [p. 219] and Hawaiian Airlines, a settlement agreement was reached resolving those issues.

Q Okay. When did the discussions begin?

A In spring of 1990.

Q What was involved in the discussions?

A I don't know specifically. I can say that I do know they involved Mr. Talbot of Hawaiian Airlines. And who - who all at the Federal Aviation Authority was involved I can't honestly say, but I do believe a fellow by the name of Mr. Merriman.

Q All right. It was my understanding - and I'll make a representation to you. Mr. Talbot indicated during the course of his deposition or earlier session of his deposition that he met with Adm. Busey in Washington. I don't have his transcript with me, and I just want to ask you: Were you involved in that meeting?

A No, sir, I was not.

Q Do you know if such a meeting took place?

A I do not know.

Q But in any event, in the spring of 1990 settlement negotiations commenced between the FAA and Hawaiian Airlines?

A There were discussions held between the FAA and Hawaiian Airlines pertaining to cases and concerns or disagreements which existed between the two which led [p. 220] ultimately to that which is marked as Exhibit 9.

Q All right. First of all, when in the spring of 1990? were these discussions?

A Sir, I'm - I would have to give my best guess, and I know I'm not supposed to guess, but it would have had to have been February or March. Probably the February time frame. I was not involved in those initial discussions.

Q Who was involved in the initial discussions? Mr. Talbot?

A To my knowledge, the subject was - was originally discussed by Mr. Talbot with individuals with the FAA.

Q Do you know who Mr. Talbot discussed these matters with?

A You've indicated to me, sir, that he had discussions with Adm. Busey. I was not aware of that.

Q I'm the first person who told you that Mr. Talbot met with Adm. Busey? The record should indicate in this particular deposition that Adm. Busey is the head of the FAA.

A That's correct.

Q Correct?

A Essentially.

Q You did not know before I told you that Mr.

* * *

[p. 291] MR. HIPPI: I'm going to object to that to the extent that it requires any disclosure of attorney-client privileged information.

A I can't honestly say I know -

MR. BOYLE: Hint, hint.

A I can't honestly say I know all the reasons why Mr. Culahara had moved from one work location to another. I do know that there was a vacancy, I believe, in the maintenance control function which required a senior, experienced maintenance individual to fill and that Mr. Culahara was selected to fill that position.

Q (By Mr. Boyle) Well, was his change - or the fact that he was no longer supervising maintenance operations, was that a disciplinary measure that was taken against him by the company, or was that simply a matter of a change in positions that had no relationship to any of the allegations against him?

MR. HIPPI: I'll object to that as assuming false alternatives.

A To my knowledge, there was no disciplinary action instituted involving Mr. Culahara. Above and beyond that I can't answer the question without violating the attorney-client privilege.

Q (By Mr. Boyle) Okay. But you know the facts - you know at least the allegations made in Mr. Norris's [p. 292] complaint, do you not?

A Yes, sir, I do.

Q Did the company ever take any disciplinary actions against anyone other than Mr. Norris?

A "Ever"? You know, sir, that's a very broad question.

Q Oh, come on. Let's not be cute, Counsel.

A No, I'm not trying to be cute.

Q Arising out of the July 15th incident. I mean, there was an incident on July 15, 1987, wasn't there, Mr. Thompson?

A Sir, you've asked me to be specific in my responses to your question. Now, your question was totally open-ended. I'm not trying to be cute.

Q - to be cute, we can get through this a little bit quicker.

A I am suggesting that -

Q Are you about to break down again?

A No, I - I beg your pardon.

Q Do you want to take a short break?

MR. HIPPIE: I'm going to object to this. He's harassing the witness once again, as he's done throughout this deposition and previous depositions.

A My question - my response to your question was, your question was very broad. And I ask you [p. 293] essentially -

Q (By Mr. Boyle) All right. I'll withdraw it.

A - to be definitive on what your question -

Q Just calm down.

A was, as you invited -

Q Calm down.

A - me to do, sir.

Q Please calm down.

A As you invited me, to do, sir, at the beginning of these depositions -

Q Please calm down.

MR. HIPPIE: Would you please calm down, Mr. Boyle. You're the one who's out of control.

MR. BOYLE: There's no need to raise your voice, Mr. Hippie.

MR. HIPPIE: You're the one out of control. You're the one raising your voice.

THE WITNESS: No one is raising a voice.

Q (By Mr. Boyle) Do you want to take a short break while you compose yourself, Mr. Thompson?

A I'm perfectly composed, sir -

Q All right. Well, then -

A - but I would like to request that you rephrase your question to be specific so I can answer it.

Q That's what you're supposed to do. If you [p. 294] don't understand the question or you find something wrong with the question, I'll rephrase it.

A All right. Please do.

Q There was an incident on July 15th, on the morning of July 15th, 1987, right?

A Yes, sir.

Q Was anyone disciplined because of this incident?

MR. HIPPI: I'm going to object to that as assuming a legal conclusion since Mr. Norris dropped out of the grievance arbitration proceeding.

A There was an action instituted against Mr. Grant Norris as a result of that, sir.

Q (By Mr. Boyle) Was he disciplined?

A There was an action instituted against Mr. Norris, yes, sir.

Q You know, I'm asking the questions. If the answer to my question is "no," you can tell me that the answer to my question is "no." If the answer to my question is "yes, but," "yes" with qualifications, or "yes, may I explain," please feel free to do that.

A All right. Yes. May I explain.

MR. HIPPI: Or -

MR. BOYLE: Okay. First of all, may I ask Joan what my question was and what your answer was.

[p. 295] (The record was read by the reporter, as follows:

Q Was he disciplined?

A There was an action instituted against Mr. Norris, yes, sir.)

Q (By Mr. Boyle) Was Mr. Norris disciplined?

A Sir, there was - there was a disciplinary action initiated. Mr. Norris did not proceed through the entire procedure.

I think, as I've previously testified, that at Hawaiian Airlines, under the contractual agreement between the parties, the preliminary action procedure is a 3- to 4-pronged system whereby an action is initiated but is not really a final action until all those steps are concluded.

In the case of Mr. Norris, there was an action instituted, and at a point in time the termination action which was instituted was reduced by Mr. Ogden to a suspension without pay for a period of time and was not pursued by Mr. Norris after that point in time.

So yes, there was an action initiated, sir.

Q All right. Was holding Mr. Norris out of service a disciplinary action?

A No, sir.

Q Was holding Mr. Norris out of service without [p. 296] pay a disciplinary action?

A No, sir.

Q Mr. Matsuzaki sent a letter to Mr. Norris in which he said, "You are discharged." Can you tell me whether or not, just in layman's terms - laymen are going to hear some of this testimony and I want to hear it - you're an attorney and I want to hear it from you. Mr. Matsuzaki's letter in which he said, "You are hereby terminated," was that a disciplinary action by Hawaiian Airlines?

MR. HIPPI: I will object to that as calling for a legal conclusion. It is not a layman's term or a layman's issue.

MR. BOYLE: Counsel, I disagree with you 100 percent on that. The fact of the matter is that ultimately a jury not composed of 12 members of the Outrigger Canoe Club or 12 members of the Oahu Country Club is going to have to decide this issue.

Now, I look at documents and I see "You are hereby discharged" and I look at other documents that say "You are hereby held out of service without pay," and to an ordinary person who doesn't have the vast labor background that you have, Counsel, that would appear to be a disciplinary action.

Now, I'm just asking Mr. Thompkins whether

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[p. 299] Q (By Mr. Boyle) Yes. In your dictionary.

A There might be instances in which they might be.

Q In this particular incident you used the term "punishment." Were you also talking about discipline?

A Yes, sir.

Q As I understand it, the company never disciplined or punished anyone other than Grant Norris for the incident that occurred on July 15th, 1987. Is that accurate?

MR. HIPPI: I'm going to object to that as assuming facts not in evidence, namely that Mr. Norris was punished or disciplined as a result of the July 15th incident.

A I have no recollection of any other actions being initiated -

Q (By Mr. Boyle) Well -

A - as a result of the -

Q - Mr. Hipp raises this problem. I'm going to move off. I'll move away. I'll get away from this. But your sentence here -

A Mm-hm.

Q And I guess we're all lawyers, but regardless of what we think of one another, the fact of the matter is that you seem to assume here in this sentence that [p. 300] there was discipline imposed or punishment imposed on Mr. Norris. Is that a fair reading of that sentence?

A No, sir, I don't think so. I think you have to -

Q Why not? Because - the reason I ask that is, if you take a look at the sentence, you say "some punishment other than termination."

MR. HIPPI: It says "if it is appropriate."

MR. BOYLE: Yes. Right. "If it is appropriate to impose some punishment other than termination."

Q (By Mr. Boyle) As of that date he had been terminated, hadn't he?

A No, he had not. The process was placed - initiated to effect a termination, but there was a grievance process actually under way. And as I've tried to explain, the grievance process - the culmination of the grievance process is the point at which time an action initiated is finalized.

So yes, sir, there was an action initiated to effect this employee's release from employment. However, it had not been finally concluded. The grievance procedures articulated and set out in the union contract had not been completed.

And the language, sir, in this paragraph has really three alternatives. If it is appropriate to [p. 301] impose some punishment against Mr. Norris other than termination if any punishment at all was going to be appropriate or any discipline at all. You know, there was a full ambit of alternatives here.

Q Well, I - you know -

MR. HIPPI: I'm going to let the record reflect that Mr. Boyle continues to interrupt the witness. He was not finished.

Q (By Mr. Boyle) Am I interrupting you?

MR. HIPPI: He said there were three alternatives.

Q (By Mr. Boyle) What are the three alternatives?

A Essentially in this case it would have been proceeding on and sustaining the initial action to impose a termination; some alternative discipline short of termination; or determining that no action, no disciplinary action or punishment, if you will, of any type was appropriate in this case.

Q Are you finished?

A Yes, sir.

Q Okay. Where was that stated in any communication to Grant Norris?

MR. HIPPI: I'm going to object to that. It assumes facts not in evidence -

[p. 302] MR. BOYLE: It sure does.

MR. HIPPI: - that Mr. Thompkins knows all the communications to Grant Norris.

A Certainly Mr. Norris, as any new employee is, is provided a full copy of the labor agreement in existence between the parties, and that when you're asking about communications, I guess that's a written document. As far as written communications to him, I have no idea what his labor union may have provided to him because obviously they were representing him at that point in time, sir.

Q (By Mr. Boyle) Okay. The communication, though, from Hawaiian Airlines said he was terminated, right?

A That's - I believe that's correct.

Q It didn't say anything about a 3-part process, did it?

MR. HIPPI: There are multiple communications here. I'm going to object to that as assuming facts not in evidence, namely that there was one communication.

A Question?

MR. HIPPI: Do you have a question?

Q (By Mr. Boyle) Yes, I do have a question.

A Okay, sir.

Q Do you have the answer?

[p. 303] MR. HIPPE: What is the question?

Q (By Mr. Boyle) Mr. Thompson, was there any communication from Hawaiian Airlines that discussed this 3-part process that you were talking about?

A The labor agreement in existence between the parties which - of which Mr. Norris has a copy specifies the grievance procedure in existence. And of course we - Mr. Norris at that time was represented by the union.

Q I'm talking about correspondence from Hawaiian Airlines. I believe we talked at some length about - Perhaps we didn't - Mr. Matsuzaki's letter. You're familiar with Mr. Matsuzaki's letter, aren't you?

A I don't know it word for word, certainly, but I'm familiar with the letter.

Q I'll represent to you that there's nothing in there about - Mr. Matsuzaki's memo, actually, it looks more like.

A Okay.

Q There's nothing in there about this 3-part process.

A All right.

Q My simple question to you is: Do you know of any letters that were sent which set forth this 3-part process?

A Not letters. The contract, however, does set

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[p. 308] evidence.

Q (By Mr. Boyle) All right. Let me withdraw that question.

Let me put it this way: Did you evaluate each one of these cases concerning maintenance or operations of Hawaiian Airlines prior to your meeting with Messrs. Lawson, Williams, and Merriman in order to discuss these matters?

A I reviewed each case file to determine what the initial letter from the FAA had set out as the maximum civil penalty which they might be seeking and whether or not there were any offers of compromise made by the FAA prior to my meetings with - with them; and also attempted to determine, as best as I could accurately do so, specific cases that the FAA may have initiated which may or may not have ever been served upon Hawaiian Airlines for any number of reasons.

And because the numbers were not consistent, the discussions formulated on those cases which - the numbers which we were sure were outstanding or felt confident were outstanding and included any and all other cases whether or not there was actually a letter or a case file number assigned to them.

Q Did you evaluate these cases prior to your meeting with the FAA?

[p. 309] A Not all of the cases on – pertaining to the merits of the case, sir?

Q Yes, sir.

A No, sir.

Q Any reason why you did not?

A In some cases there were not complete case files available.

Q Did you feel – I take it you did not feel it would be a good idea to evaluate how much these cases might potentially be worth if the FAA filed actions in the United States District Court for the District of Hawaii?

MR. HIPPI: I'm going to object to this as it calls for speculation.

A I reviewed the cases from the perspective of what – as I've indicated, from what was in the initial letter from the Federal Aviation Administration as far as their proposed civil penalty to determine what the maximum potential liability would be in the event the claims were ever to be resolved adversely to Hawaiian Airlines. However, in many of the cases our opinion was that the cases, if they proceeded, would be resolved favorably to Hawaiian Airlines.

Q (By Mr. Boyle) Okay. But in order to determine whether or not they'd be favorably resolved, [p. 310] that is, resolved favorably to Hawaiian Airlines, did you not look at the facts and circumstances or the basis of each one of these claims?

A Only those in which I could locate the claim files.

Q You've said that repeatedly this morning and this afternoon. How many claim files could you not locate?

A I don't recall specifically, Mr. Boyle. There were a few that could not be located.

Q Well, there are – there's a list here on Exhibit 9. Can you tell me by looking at the list which files you could not locate.

A The files I could not locate generally pertained to numbers not listed here.

Q All right. But of these files – okay. All right. Even though this document, that is to say, Exhibit 9, lists a series of cases, the document itself covers more than that list?

A That's correct.

Q The documents you did not – strike that.

And the files that you did not evaluate are not listed here?

A The files I did not evaluate are not listed here?

[p. 311] Q Right.

MR. HIPPI: I'll object to that as vague and ambiguous.

A There were other files which I did evaluate which are not specifically listed here but which are settled by the agreement.

Q (By Mr. Boyle) How many?

A Hmm. I would have to guess. 5 or 6.

Q Did you evaluate the axle sleeve file?

A In that particular instance there was initial request of the FAA, I think as I've indicated, for initial civil penalty in excess of 900,000. Then there was an offer by the Federal Aviation Administration - or a reduction of that to something other than 300,000. The file was substantially discounted at that point in time, and my perception was, it was an acknowledgement of the weakness of that case.

Q What? To discount it from 958,000 to three hundred or -

A Whatever it was.

Q Whatever that figure was?

A Yes.

Q What do you evaluate the file to be worth?

A I felt that we had significant defenses to that case which would have led to Hawaiian prevailing in the [p. 312] action.

Q Okay. Can you tell me what - you finally reached an agreement for the total payment to the FAA of some \$360,000, right?

A Mm-hm.

Q You have to answer out loud.

A Yes, that's correct. I'm sorry.

Q All right. Can you tell me what that was for.

A Essentially any and all cases either initiated or potentially being initiated by the FAA pertaining to any

and all matters pertaining to the operations of Hawaiian Airlines occurring on or before April 13th, 1990.

Q I understand that, but please tell me, for example: What value did you give 85WP130102?

A I don't recall.

Q If I asked you the same question with respect to the rest of those numbers, would you recall?

A No, I would not.

Q Where did you get the number of \$360,000?

A Well, essentially it was a negotiated figure, looking at the maximum exposure on all the cases without regard, necessarily, to the merits.

Q What do you mean "without" - how can you talk about - I'm not trying to argue with you, but how can [p. 313] you talk about exposure of the case without regard to the merits?

A Essentially the -

Q I usually figure -

A Okay. I've indicated that the - that we look at the case or I looked at the cases from the perspective of what the FAA had originally requested as a suggested maximum civil penalty which could be imposed. And I know that amount was in excess of \$1 million.

And then I evaluated the cases from the perspective of what the cost of litigation may well be, the time involved for counsel inside the company and outside the company, and came up to a conclusion as to an appropriate settlement range which we would consider to resolve

any and all actions up through that point in time; considering also the desire of the company under – subsequent to the tender offer to be working on a clean slate and the desire of the FAA to get all of these cases behind them.

Q What was the – what was your range of settlement figures prior to your 13th of April 1990 meeting?

A I would – don't specifically recall, but the – the upper range of which I would have considered settlement as being reasonable without having further [p. 314] discussion was a little over \$400,000.

Q What was said at the meeting on April 13th, 1990?

A I don't recall everything in detail. I know that –

Q Did you keep any notes? Most lawyers do.

A I did keep notes on that day, yes, sir.

Q Where are those notes presently?

A Those have been discarded after the final settlement was agreed to and the settlement agreement was drafted and signed. Those were undoubtedly discarded and the case files were retired.

Q Did you do anything – including the axle sleeve file?

A The axle sleeve file, I don't recall having anything other than a skeletal file on the axle sleeve.

Q Why did you have a skeletal file on that? Was that a reflection of the exposure to the company of that particular file?

A No, sir, I don't believe. I think the – the files were essentially –

MR. HIPPE: Can we take a 1-minute break.

MR. BOYLE: Let the record indicate that it was Mr. Hipp who asked for the break.

MS. MOLLWAY: And also that I came in and gave [p. 315] him a letter.

MR. BOYLE: "And let the record also indicate" – Jesus.

(Recess: 2:03 p.m. to 2:09 p.m.)

MR. BOYLE: Can you read back the last couple of questions and answers.

(The record was read by the reporter.)

Q (By Mr. Boyle) All right. Basically, Mr. Thompkins, my question was: The fact that your file with respect to the axle sleeve matter was skeletal, was that fact a reflection of your belief that the matter had no merit?

MR. HIPPE: I'll object to that. Vague, ambiguous, calls for speculation.

A No.

Q (By Mr. Boyle) What was it a reflection of, if anything?

A The fact that that matter was being handled by Washington counsel and that the files were maintained in Washington, DC, and I simply only had a skeletal file.

Q Was that also one of the reasons why you called Washington counsel?

A That's correct.

Q Now, you sat down with these individuals in LA, and I think you've indicated you don't recall everything [p. 316] that was said. I want you to tell me what you do recall was said. First of all, how long did the meeting last? I always forget that question.

A Probably 3 or 4 hours.

Q Morning or afternoon?

A Morning.

Q Weekday?

A Yes.

Q What day, do you recall?

A No, I don't recall.

Q What occurred? What was said?

A Essentially, we introduced each other, and we talked in terms of the fact that Hawaiian Airlines had been the subject of a successful tender offer at the end of December of 1989 and that I - I indicated my understanding that our president, Mr. Talbot, had had discussions with Mr. Merriman in which the prospects of resolving any and all outstanding issues that might exist between the Federal Aviation Authority and Hawaiian Airlines was a subject of discussion and that I was pleased to have an opportunity to meet them and sit down and attempt to explore the possibility of setting all those things behind us and proceeding with essentially a new slate.

I pointed out that I had attempted to generate [p. 317] a list of matters which I believed then might be outstanding involving the Federal Aviation Administration and Hawaiian Airlines and that I had significant concern as to whether or not my listing was consistent with what they had in their files and whether or not there were other cases which their records might reflect had been initiated and perhaps withdrawn; or initiated, not processed; or initiated and processed which I might not have records.

We went through their listing of what they had together with questions on some listings that I understood might have existed in Washington for which I could find no files. There were some files that none of us could determine what had existed.

We went through the procedures on how, at least my understanding - or what - they gave me a very brief overview of how they assigned case numbers and who - which division does it, the - initially there might be a matter that's assigned a case number. It's referred by the operations division, as I understood it, to their counsel, and the counsel may or may not ever send a letter on.

So there was - there were some significant questions as to the numbers of cases and whether or not they were active cases or perhaps past settled cases or [p. 318] cases that were never served.

And we - we discussed ways to approach and attempt to put all these issues behind us and Hawaiian's position that essentially the cases were without merit, but we were interested in talking with them from the perspective of maintaining an open, full dialogue with the

FAA, and - in an attempt to exercise some economy and save all of us time, effort, and expense in litigating any cases which might be brought under the old FAA procedures, which would have to be brought through the United States Attorney, if at all, and defended in federal district court if the U.S. Attorney decided that the FAA cases were worthy of presentation, and the cost of defending that by the U.S. - or prosecuting those cases by the U.S. government in the event they chose to prosecute and the cost to Hawaiian of defending cases.

And finally a mutual agreement was reached as to the fact that it was desirable to settle all those cases which were then pending as of - on or before April 13th, whether or not they had been assigned case numbers or whether or not there had been an action initiated, and we then discussed settlement amounts and agreed tentatively on a figure, and then we discussed a payment schedule.

Generally then we discussed the positive

* * *

EXHIBIT 1

TO: Howard Ogden
FROM: Steve Thompkins
SUBJECT: Termination of Employment
Grant Norris
DATE: August 17, 1987

Reference is made to our previous discussions concerning this matter. I want to emphasize that as Mr. Norris was in fact terminated on August 3, 1987. It is very important that immediate attention be given to the issue of whether or not we wish to sustain the action of Mr. Matsuzaki in terminating his employee or whether or not a return to employment is appropriate.

If it is appropriate to impose some punishment against Mr. Norris other than termination, such action should be taken promptly to avoid the problems which are created by a back pay award either at the 3rd step of the grievance procedure or by an arbitrator. Obviously none of us want to see an employee given an extended vacation with pay if that is not appropriate.

I am aware that other problems exist pertaining to this case, however I would suggest that we review the case file and if it appears that some disciplinary action other than termination is appropriate that you take prompt action to modify Mr. Matsuzaki's order (for example from a termination of employment to a suspension without pay for a period of time) and get this gentleman back to work.

Please advise at your earliest convenience.

/s/ Stephen Thompkins

SRT:cud

EXHIBIT 4

(Logo)
HAWAIIAN

AIRLINES

September 14, 1987

Mr. Samson Po'omahealani
IAMAW District Lodge 141
1449 South Beretania Street
Honolulu, Hawaii 96814

Re: 3rd Step Grievance Hearings
Enos, Palmer and Otoguru

Dear Sam:

This is to follow up on your conversation today with Mary Ellen Sorensen pertaining to subject grievance hearings.

First, please be advised that Grant Norris has been reinstated, which negates the need for a hearing at the third step. Second, October 5, 1987 is agreeable to me for scheduling the third step hearings for Gordon Palmer, Steven Otoguru and Fred Enos. It is my understanding that the Palmer/Otoguru grievances will be heard at 10:00 am with the Enos hearing to follow (at approximately 11:00 am).

In the event HAL does not have a new Director of Industrial Relations on board, we may want to request a delay as none of these cases involves a discharge.

In any case, all hearings will take place in the HAL conference room at 1164 Bishop Street, Suite 800. Your kokua is appreciated.

Sincerely,

/s/ S.R. Thompkins
Stephen R. Thompkins
Vice President-Administration
and Counsel

cc: D. Glover
B. Perry
G. Fleming

SECTION I

R - REINSTATEMENT

N - NEW HIRE

C - CHANGE DATA OR TRANSFER

T - TERMINATION OR LEAVE

R

EFFECTIVE DATE OF NOTIFICATION:

Sept. / 15 / 1987

NAME

NORRIS, GRANT TIMOTHY

(LAST - FIRST - MIDDLE)

LINE MAINTENANCE

4063

EMP. NO.

LOC CODE

532

DATE PREPARED

9 / 15 / 87

SECTION II

RATE

\$10,51 +

OLD HOURLY RATE OR OLD MONTHLY SALARY NEW HOURLY RATE OR NEW MONTHLY SALARY

CLASSIF.

A/C Mechanic

F.T. M1

FORM
INSTRUCTIONS
AND CODES
ON BACK

NAME

NORRIS

GRANT

T.

PLEASE TYPE
OR PRINT ALL
INFORMATION

STREET ADDRESS

1125 A 2nd Avenue, Apt. 4

STREET ADDRESS

CITY STATE

Honolulu

HI

96816

STATE

ZIP

MARKED OFF
SPACES INDICATE
MAXIMUM NUM-
BER OF CHARAC-
TERS ALLOWED
IN EACH BOX

PERSONAL DATA

561-92-2147

12 / 16 / 53

M

S or M

SOCIAL SEC. #

BIRTHDAY

SEX

Mar. Status

SECTION III
TRANSFER

LOC CODE

TO LOCATION

LOC CODE

LETTER AND/OR
NUMBER NEED
NOT BE PLACED
WITHIN MARKED
OFF SPACES

SECTION IV

LEAVE OF ABSENCE
OR
TERMINATION

LAST DAY WORKED

TOTAL DAYS OFF

Would you
Rehire?Yes ☐No ☐Resigned ☐Laid Off ☐Discharged ☐Other ☐

REMARKS:

Give Reasons for all actions

Employment re-instated per Mr. Steve Thompkins Office.

SECTION V

PERSONNEL FILE
WILL BE COMPLETE

THIS SECTION 16 1987

HAWAIIAN AIRLINES
PRESIDENT'S OFFICE

HAWAIIAN AIRLINES, INC.

FED ADDIT STATE ADDIT.

LIC. UNION

CODE CODE

SEP 15 1987

BASES ADDA
FLT. A. RET.

HOURS

MOS.

LONGEVITY

DATE

VAC

S/L RES.

REINSTATEMENT

FLT. ATT.

SECTION VI

APPROVALS:

(Approval spaces on
right required only in
case of transfer)

IMMED. SUPVR.

DIVISION HEAD

DEPT. HEAD

IRD.

RECEIVING ORGANIZATION

DATE

PERSONNEL

EXHIBIT 5

EXHIBIT 9
UNITED STATES OF AMERICA
FEDERAL AVIATION AUTHORITY

In the matter of

Hawaiian Airlines, Inc. ("HAL")

FAA Case Nos.

85WP130102

88WP130009

88WP130028

88WP130046-47

88WP130142

89WP130077

89WP130095

89WP710043

90WP130010

And all other matters which might give rise to possible FAA cases concerning maintenance or operations of HAL on or prior to April 13, 1990 (excluding security cases).

SETTLEMENT AGREEMENT

This Agreement entered into this 30th day of May, 1990, is between Hawaiian Airlines, Inc. ("HAL") and the Federal Aviation Authority, a United States governmental agency. This agreement constitutes a full, final and complete settlement of all the above-referenced FAA cases pending against HAL as well as a final settlement of all potential FAA cases against HAL arising out of any matter occurring on or before April 13, 1990 (other than security matters).

The terms of the Agreement are as follows:

1. The FAA agrees to formally close with prejudice each of the above-referenced cases without making any findings of fact or conclusions of law.

2. The FAA's formal closure, with prejudice, of each of the above-referenced cases shall take place as of the date first written above.

3. The FAA agrees that this Agreement covers all matters arising out of or relating to the maintenance or operations of HAL (other than as to security) through 11:59 p.m. on April 13, 1990. Therefore, the FAA agrees not to open or pursue any case or investigation against HAL for any violation of Federal Aviation Regulations occurring on or prior to April 13, 1990. This Agreement does not include settlement of actions - if any exist - against individual employees in their individual capacities.

4. In return for the promises of the FAA contained in this Agreement, HAL promises to pay the FAA the sum of \$360,000 as follows: \$120,000 will be paid on May 28, 1990; \$120,000 will be paid on the first Tuesday following September 1, 1990; and \$120,000 will be paid on the first Tuesday following January 1, 1991. All parties agree that by making the foregoing payments neither HAL nor its owners, directors, officers, managers, supervisors, or employees are admitting to any fault or any violation of the Federal Aviation Regulations or any other law whatsoever. HAL is entering into this Agreement to avoid the costs of litigation in the above-referenced cases and in order to foster good relations between the FAA and HAL's owners, directors, officers, managers, supervisors, and employees.

Understood and agreed to as of the date first written above.

FEDERAL AVIATION AUTHORITY

By /s/ DeWitter T. Lawson, Jr.
Its Asst. Chief Counsel - Western-
Pacific Region

HAWAIIAN AIRLINES, INC.

By Stephen Roy Thompkins
Its Vice President, Administration
Counsel and Secretary

[p. 1] IN THE CIRCUIT COURT OF
 THE FIRST CIRCUIT
 STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12

vs.

HAWAIIAN AIRLINES, INC.,)
Defendant.)

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	89-2904-09

vs.

PAUL J. FINAZZO;)
HOWARD E. OGDEN;)
HATSUO HONMA; and)
DOES 1-50,)
Defendants.)

Volume 1

DEPOSITION OF TED T. TSUKIYAMA, ESQ.,

Taken on behalf of Plaintiff at the offices of Cades Schutte Fleming & Wright, 1000 Bishop Street, Honolulu, Hawaii, 96813, commencing at 1:08 p.m. on Thursday, July 12, 1990.

* * *

[p. 4] TED T. TSUKIYAMA, ESQ.,

Being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. BOYLE:

Q Would you state your full name for the record, please.

A Ted T. Tsukiyama.

Q What is your address, Mr. Tsukiyama?

A Business address is 620 H-K Building, 820 Mililani Street, Honolulu, 96813.

Q Your home address?

A 2536 Sonoma Place, Honolulu, 96822.

Q What was Mr. Hipp talking to you about just a moment ago?

A What - whether emotional damages would be includable in the relief under the - under the Whistleblowers' Act.

Q Is that all he said?

A I never had a chance to say anything.

Q I see. Okay. Mr. Tsukiyama, as you know, your deposition is being taken today because you have been listed as a witness that Hawaiian Airlines intends to call at the trial of this action.

[p. 5] MR. HIPPI: I'll object to that. Discovery is closed in the Hawaiian Airlines case. As Mr. Boyle has recognized -

MR. BOYLE: It's a consolidated case, Counsel. It's a stupid objection. Don't waste my time.

MR. HIPPI: It's noted in Mr. Boyle's document filed in court - just filed before the judge today.

Q (By Mr. Boyle) Have you ever had your deposition taken before?

MR. HIPPI: I'll finish my objection, please.

MR. BOYLE: Why don't you finish your objection at the end? You've made your objection. You're just cluttering up my record. I'm paying for the original. I don't want to hear your stupid statements for another three or four hours. You've made your statement. That's enough.

Q (By Mr. Boyle) Have you ever had your deposition taken before, Mr. Tsukiyama?

MR. HIPPI: Excuse me. Let me finish my objection and then we'll go on.

MR. BOYLE: It's not an objection.

MR. HIPPI: My objection -

MR. BOYLE: What is the objection to the form of the question, Counsel?

MR. HIPPI: My objection is that -

[p. 6] MR. BOYLE: You're not making any objection to the form of the question, and therefore you're out of line.

MR. HIPPI: My objection is that this deposition is for the Finazzo case only.

MR. BOYLE: I want the court reporter - look, I'm not going to take any more of Mr. Hipp's speeches

down. You know, if you want to get an agreement to have Mr. Hipp pay you for his speeches, that's fine, but I'm not paying for it.

Q (By Mr. Boyle) Now, have you ever had your deposition taken before, Mr. Tsukiyama?

A I believe so, but very vaguely.

Q Do you recall how many times you've had your deposition taken?

A Not more than once or twice.

Q Do you recall when it was?

A At least 7, 8 years prior.

Q Okay. Do you recall in what connection it was?

A I can't remember.

Q What is your understanding of the claim filed by Grant Norris against Hawaiian Airlines?

A He was - he's complaining of his termination from employment on the grounds that it was unjust and improper, but in particular because he, according to the

* * *

[p. 47] A No. That would - that's why the arbitration process is deemed to be final and binding except where it may be reversed on those four very narrow grounds that are provided for in the Chapter 658-9.

Q I understand that. If we had an arbitration. But we don't have an arbitration here, right?

A Well, it was in the process of being arbitrated.

Q And the grievant elected not to go forward with that procedure, right?

A All I can do is judge from the documents that were that I have here. I don't know what he did.

Q Okay. Well, what would they indicate that he did?

A Well, that at - before the third level hearing, his discharge was reduced to a suspension and he was offered reinstatement. I can only surmise that he didn't accept it because he is now in court.

Q Right.

A That's only a surmise.

Q Okay. Now, let's get back to the original question. You agree with me that any testimony you might give which interprets the Whistleblowers' Protection Act - the WPA - Section 378 of the Hawaii Revised Statutes, Section 378-61, et seq., would be a violation of the * * * [p. 52] Matsuzaki document that's dated August 3, 1987?

A Yes. And the last line of which says, "Decision: Mr. Grant Norris terminated as of this day, August 3, 1987, for insubordination."

Q Okay.

A That's what I read.

Q So is it your testimony that that's when he was fired?

MR. HIPPI: I'll object to that.

A If that -

MR. HIPPIE: Incomplete hypothetical.

A - states a fact, that's the extent of my knowledge.

(Discussion off the record.)

Q (By Mr. Boyle) You're holding several documents in your hand. Perhaps you could tell us what they are.

A Well, examining that document dated August 3rd - there's a typographic on it. It should be "1987." It appears to be the hearing that the contract requires which must be had before a employee is suspended or terminated, and it is this employer's disciplinary action of termination that a grievant is grieving from. And then it went up through the grievance process, and the last thing we find is, at the third step it's been [p. 53] converted to a suspension and a reinstatement.

Q That's a suspension without pay?

A Yes.

Q That's also a warning to Mr. Norris that he's been a bad boy and the company is going to be watching him closely just in case he refuses to sign off any more unair-worthy planes?

MR. HIPPIE: I'll object as the document speaks for itself.

A It's fairly common verbiage.

Q (By Mr. Boyle) But what does it mean? It's a threat, isn't it?

A It's a -

Q I have to tell you, Mr. Tsukiyama. I received a letter like that once when I was in school, and I took it - it

was from the dean of students, and I took it to mean a threat.

MR. HIPPIE: I'll object to that.

Q (By Mr. Boyle) Are you telling me that that letter is not a threat?

MR. HIPPIE: I'll object to that. Was your letter under a collective bargaining grievance process?

MR. BOYLE: Are you asking the questions now, Counsel?

MR. HIPPIE: I'll object to that as an incomplete [p. 54] hypothetical.

Q (By Mr. Boyle) Isn't that a threat?

A I would say it is not so much a threat as a warning to comply with industrial due process standards that a - an employee should not or cannot be disciplined without adequate notice of - notice in the way of a warning that a future repetition of certain conduct will lead to heavier disciplinary action, including possibly discharge.

Q Yes. It's a statement not to engage in the same conduct that got the grievant in that position in the first place, right?

A Well, the notice is there so that it cannot be said that the guy never was told by the company that if he tripped and fell on his face again, he would face these consequences, so the companies almost general - almost invariably have that kind of language.

Q In this case Mr. Norris had been insubordinate, correct?

A For – for refusing to sign off, he was considered insubordinate by the company.

Q Right.

A Yeah.

Q They were telling him, in effect, to sign off in the future, right?

[p. 55] A Not necessarily.

Q They were not?

A Not necessarily.

Q They weren't telling him not to engage in the same conduct that got him fired on July 31st, 1987?

A Well, I would say that he would have – he could abide by his conscience. And if this occurred again, he could refuse if he had a legitimate grounds for refusing on grounds of safety or he was not going to be a party to something that would – that was a risk or hazard to public safety. That would be an exception that – it's a defense to the – a well-recognized defense in the field of arbitration against an insubordination rap.

Q Does every harassment on the job rise to the level of a matter that you can take into the grieving process that Mr. Hipp has always referred to?

A Well, the general rule is that when you are ordered or directed by the company to do something, you obey, you comply –

Q That's correct.

A – and then file a grievance. So it's called "Obey now" "Perform now, grieve later." But there are these exceptions well – that's why I have my little book here that states that exception.

Q There's another individual in this case: Tom

* * *

[p. 59] – or general opinion that, looking at these bare facts and the statutory law and the contract and in making a very cursory comparison, my general impression would be that if this man had come to arbitration, that he would have gotten a – he would have been successful in proving his position – his case that he was improperly terminated for refusing to sign off on a matter that seemed to – allegedly seem to compromise with the airworthiness of the aircraft. And that's one of the recognized defenses of an insubordination case.

The case would have been in arbitration, would have been in front of an arbitrator. Once the arbitrator is selected, it probably could have been finished in two or three months. I'd say by the end of 1987, he would have had a final and binding determination of his grievance. He would have been reinstated, and his claim for relief would include not only getting his job back, but he would – the scope of relief could include all pay that he lost, any contractual rights, accrued rights that were suspended in the interim, such as seniority and accrued vacation, accrued sick leave, et cetera. All the contract rights. And basically he would have been what we call made whole,

meaning put back in the status quo as if he had not suffered – if he had not been improperly treated.

[p. 60] That's my general impression of the case, that I would say that his rights and remedies would have been superior to those seeking recourse through the courts, which is – as it's shown, is still pending, whereas through arbitration this would have been completed two years ago.

Q What is your understanding of what kinds of damages he can seek under the statute?

A Well, generally they come and ask, so I don't know what he would be asking. I know he would be asking for his job back. He'd be asking for back pay and restoration of all deprived contractual rights. If he had incurred, say, a private attorney, quite conceivably that would have been a but-for type expense: But for this inconvenience and impropriety, he would not have incurred attorney's fees.

Q What about general damages for, say, emotional distress –

A Well –

Q – flowing from the violation of the statute? Are you aware whether or not if he pursues – strike that.

Can you tell me whether or not, if you're the arbitrator in this particular case and Mr. Norris asks for damages for emotional distress, he would be awarded [p. 61] such damages.

A Well, I would – I would anticipate an objection from the employer that that would be a – something that

he could – he would have to file his claim, you know, under workman's comp. We would not intrude on something that would be his statutory remedy, but basically –

Q What if he – I'm sorry.

A I mean, without knowing, you know – generally the union or the union attorney will ask for various scope of relief, and we'd look at it. We'd look at it. But basically the formula is to make a person whole for whatever he has endured or suffered because or by virtue of the improper employer action which is deemed to be a violation of some right or rights under the contract.

Q Suppose the – I want you to assume for a second that the employee was threatened by a supervisor after the employee – after October – excuse me, July 31st, 1987. Would the emotional distress be covered by the worker's comp statute?

A Well, I – you know, I can't speak for what rights he has under workman's comp, and if it were pointed out or successfully argued by employer that I would be exceeding my jurisdiction – we do have jurisdiction.

[p. 62] Q Sure.

A But the jurisdiction of an arbitrator to afford relief is considerable, very broad. Ever since the U.S. Supreme Court in the famous 1960 Steel Worker trilogy – it's a set of three decisions involving the steel workers' union that gave broad authority to the arbitrator to not only determine the contractual rights but to afford the appropriate relief.

Q Can the arbitrator award damages, general damages, for emotional distress caused after – or while the

employee was not within the course and scope of his employment?

A That's a hard one to answer because you said "outside the scope of his employment."

Q Right.

A And -

Q As I understand it, you've indicated that Mr. Norris was fired on July 31st, 1987. Is that correct?

MR. HIPPI: Most certainly not correct.

A Well, that was - that was the disciplinary action. It's - it's not the - you know, the record is left with him being reinstated, so I can't say he's - that was the company's disciplinary action, that he was terminated. But the company changed its position during the course of the grievance procedure, and if it had come

* * *

[p. 120] A. July 10, 1990 is the filing date.

And possibly the State Law on Arbitration Awards, chapter 658, of the Hawaii Revised Statutes.

Q. May I see that?

A. (Complying).

Q. Do you know why Mr. Hipp is whispering into your ear?

A. I can't hear.

Q. What did he say?

A. Something about legislative history. I think I mentioned that. Legislative background, including committee reports on the Whistleblower Act.

Q. Anything else?

A. That's the extent of the facts and the law that I have looked at.

Q. And your opinion, again, is that the claimant would have been better off if he had pursued his rights and remedies under the collective bargaining agreement?

A. That's how I see it.

Q. Let me get some definitions. The 'claimant' in this case is Grant Norris?

A. Yes.

Q. What do you mean he would have been "better off"?

A. I believe that, based on this record that I have just alluded to, that the collective bargaining agreement does provide Mr. Norris with rights and remedies pertaining to [p. 121] his claim which would be better or superior to that available to him under the State Whistleblowers' Act.

Q. If you may forgive me the impertinence, that almost seems to be begging the question. How is it better?

A. Okay. That calls for a long answer.

Q. Well, I trust that you will be asked at some point in time what you mean by 'better.' And that's my question now.

A. Is there a question?

Q. Yes, sir.

A. What I just gave you is the bottom-line.

Q. I know that's the bottom-line. And I asked you earlier what did you mean by the term "better off" as you used it in your opinion 'The claimant would have been better off if he had pursued the rights and remedies available to him under the collective bargaining agreement.' And you then, in response to that question, said that 'Under the collective bargaining agreement his rights and remedies were better.'

MR. HIPPIE: Or 'superior'.

A. Or superior.

Q. Or superior. Well, what's the different between 'better' or 'superior'?

A. Well, they are both generic terms far more advantageous than what it is being compared to.

Q. What was it being compared to?

A. The Whistleblowers' Act, rights and remedies.

[p. 122] Q. Was it being compared to anything else?

A. No, not based on this record.

Q. Well, he has a complaint here, right?

A. yes.

Q. And are you saying that his remedies under the collective bargaining agreement afford him rights and remedies that are superior to the prayers for relief in the complaint?

A. He would get the equivalent or better relief if he went through the arbitration forum.

Q. Is he entitled to punitive damages in the arbitration forum?

A. He may.

Q. How much? What are the ranges of punitive damages that he could look forward to in the arbitration forum?

A. I can't answer that in the absence of some specific facts.

Q. Well, what are the ranges of punitive damages that he could look forward to in front of the Honolulu . . . State of Hawaii jury?

MR. HIPPIE: I'll object to that. Incomplete hypothetical. Assumes facts not in evidence. Vague and ambiguous.

A. That's speculative for me to try to say in the absence of knowing, you know, what he's actually claiming he suffered as a result of this matter.

Q. How about this: He's claiming back pay of \$65,000. He's claiming projected losses of \$365,000. He is claiming

* * *

[p. 145] court reporter to read back the last couple of questions and answers.

(Whereupon, the section in question was read).

A. We could have reached an arbitration decision as long as there is satisfactory proof that what Mr. Norris

was complaining about was a threat to what he believed health and safety.

Q. Well, would you have been able to make a decision based solely on Mr. Norris' testimony? And the testimony of the Hawaiian Airline's management personnel? Or would you have preferred to have the testimony of the individuals who can corroborate Mr. Norris' version of the events.

MR. HIPPI: Objection; vague and ambiguous. Assumes facts not in evidence. And an incomplete hypothetical.

A. I believe that Mr. Norris and other mechanical personnel around him could show that based on the specs that this part that he was complaining of was damaged, or non-conforming, and was a questionable piece of equipment to re-install.

Q. Well, if they bring in three mechanics - Mr. Norris comes in and testifies that he didn't think the part had the specifications and that he asked his immediate supervisor to show him where in the manual it said that that met specifications. That would be his testimony. I want you to assume that for a minute.

[p. 146] And then Hawaiian Airlines, at that point, brought three people in to testify that in their considered opinion, the matter met . . . the part met specifications. And that Mr. Norris' refusal to sign off on that part constituted insubordination.

Are you telling me that you would have, at that point, decided in Mr. Norris' favor?

MR. HIPPI: I'll object to that as vague and ambiguous. Incomplete hypothetical. Assuming facts not in evidence.

MR. BOYLE: Well, I don't know what you mean by "Incomplete hypothetical." But I'm certainly not going to read Mr. Tsukiyama the deposition of every single mechanic who has been deposed in this case.

My question stands.

Q. Do you remember what my question was?

A. I would accept Mr. Norris' subjective believe, as long as there was some reasonable foundation that he sincerely felt that this item was non-conforming and would be a compromise to the safety of the aircraft.

Q. You would accept that over the sworn testimony of the . . . for example, his supervisor?

A. Well, I think -

MR. HIPPI: I'll object. Vague and ambiguous. Assumes facts not in evidence. Incomplete hypothetical.

[p. 147] A. The issue . . . or the context where that fact would come in is whether he was justified in refusing to sign off, I believe is the term.

Q. What kind of evidence would you want to see as an arbitrator to determine whether or not he was justified in refusing to sign off?

A. I don't think we have to determine that, in fact, he was right or wrong. But that as long as there's a reasonable foundation for his belief. And according to the facts . . . you know, I think it said the specs called for

.005/8" and he could show that it was, you know, way off specs. And evidence of that type.

Q. Okay. Let's suppose that Mr. Hipp was the attorney representing Hawaiian Airlines. Would you anticipate from your previous experience with Mr. Hipp, that Mr. Hipp, at this point, would roll over and play dead and not put on any witnesses? Or introduce any testimony to refute Mr. Norris' story?

MR. HIPPI: I'm going to object to that as vague, ambiguous; assuming facts not in evidence. Incomplete hypothetical. And not reasonably calculated to lead to discovery of relevant evidence.

A. Well, I would assume that the company would bring in first the supervisor -

Q. That's Mr. Culahara in this case. Do you know one way or

* * *

[p. 158] A. Well, just to add that it goes much faster and smoother in an atmosphere that is considerably less adversarial than in court. And most arbitrations are over within a day and . . . at least the factual portion. And then the parties have the option whether to render final argument orally or by written brief.

But . . . the whole process is much more expeditious and informal. And it is between parties that have a continuing on-going relationship, rather than two strangers that do battle in court and never see each other again.

Q. Are there any other grounds upon which you base your opinion that the rights and remedies set forth

in the collective bargaining agreement are 'better' or 'superior' to the rights and remedies set forth in the Whistleblower Protection Act?

A. Well, like I said, this contract is unusual, in that it does have provisions which, I think, protect an employee in Mr. Norris' position with regard to refusing to sign off or complaining about what he believes to be unsafe work . . . or unsafe practices.

Then we get into . . . this would primarily come up in the context of 'Was he insubordinate but for refusing to sign off?' And, like I pointed out in the earlier deposition, that there are these well-recognized exceptions . . . or defenses to being declared insubordinate where the employee [p. 159] can justifiably show that what he is protesting or complaining about does, in fact, impact health or safety of either himself, or his fellow workers, or the work place in general.

In this case, it would be, maybe the safety of the passengers.

Q. Well, the inclusion of this particular provision -

MR. HIPPI: Are you going to let him finish? Did you want the full answer to your question concerning rights and remedies?

MR. BOYLE: I thought he was finished.

MR. HIPPI: - do you want to cut him off?

MR. BOYLE: I thought he was finished.

MR. HIPPI: He hasn't even covered remedies -

MR. BOYLE: Why don't you just shut-up, Counsel.

Q. BY MR. BOYLE: Did I interrupt you, Mr. Tsukiyama?

A. (No audible response).

MR. HIPPI: Would you read the question back?

(Whereupon, the section in question was read).

A. Well, as I was pointing out, this agreement, in an unusual fashion, does cover this so-called Whistleblower incident . . . exception to insubordination, very specifically in the contract. But even if the contract didn't, the general arbitration law would render . . . make available these defenses based on the grounds of health or safety the [p. 160] justification that the employer/employee would raise.

And these would all be addressed to the propriety of employer's disciplinary action; which, initially, resulted in his termination and . . . it ended up during the grievance process, to suspension.

As I indicated, I think . . . particularly because the contract, itself, recognizes this situation . . . or anticipates this situation in writing . . . you know, that he has a much stronger foundation to stand on in this case.

If I had it, and maybe three or four or five other arbitrators, who would sit and hear this type of case, based on what facts are revealed in the Complaint . . . and assuming that they can be established as true . . . that this complainant would, I think, have a very good chance of prevailing in having his grievance sustained.

In which case, the relief that he could ask the arbitrator and be awarded, would be just as good or better than what is provided in the law. But, basically, it's to make him as good as he was, as if this had never happened.

And when I say 'better', I'm referring to the fact that the courts allow a broad latitude of arbitral discretion in quoting appropriate relief. And . . . so in that sense, depending on the particular facts or the claims or the prayer made, that as long as there were facts to substantiate it, that he could get maybe some measures of

* * *

[p. 171] award Mr. Norris his job back, as a practical matter, wouldn't you have expected . . . at base maintenance out here, with all these people gossiping and talking about the FAA . . . wouldn't you have expected that he would be the subject of a great deal of retaliation by managers and co-employees?

MR. HIPPI: Objection; vague, ambiguous, incomplete hypothetical.

A. You're giving me a scenario that's not in the Complaint.

Q. No. But I'm asking you . . . I'm asking you on the basis that you're a distinguished practitioner in the law; you're an eminent arbitrator . . . you're also a human being. And quite apart from the fact that you're a lawyer, an arbitrator, so forth and so on, wouldn't you expect the company and individuals at that company to make Mr. Norris' life as miserable as possible once you had awarded him his job back? Either working directly under

Mr. Culahara again? Or working under Mr. Matsuzaki? Or some other manager?

A. Well, accepting this worst scenario that you are describing is brought out in an arbitration. One of the acts of remedy or relief, particularly if requested by the union, is an injunctive-type of cease and desist directive against management . . . and perhaps even individuals in particular, which would become part of the award. And that award is always enforceable in court.

* * *

[p. 176] collective bargaining agreement between Eastern Airlines and the International Association of Machinists didn't prevent massive falsification of records, intimidation of employees, and threats of physical violence against mechanics; did it?

MR. HIPPI: Objection; assumes facts not in evidence. Incomplete hypothetical. Not reasonably calculated to lead to the discovery of relevant evidence.

A. I'm not familiar with what happened at Eastern Airlines.

Q. Well, you said that this Whistleblowers' Protection in the CBA . . . collective bargaining agreement . . . was, to use your term, 'unusual'. And you stated that twice.

And let me represent to you - strike that.

Have you seen any other collective bargaining agreements between the International Association of Machinists and other airlines?

A. With this clause in it?

Q. Yes.

A. No; I can't recall. That's why I said it was unusual to me.

Q. Well, did you see that clause included in any other contracts . . . collective bargaining agreements you have ever looked at between airlines and machinists?

A. Not that I can recall.

Q. And how many collective bargaining agreements between airlines and machinists have you looked at?

A. Six to ten airlines, maybe.

[p. 177] Q. How far back do those contracts date?

A. I've been arbitrating for 32 years. My earliest airlines cases would go back at least 25 years.

Q. Well, I mean of the six to ten . . . Any of those six to ten have you reviewed recently?

A. No . . . no. Not to look for this kind of language.

Q. Whistleblower protection?

A. Yeah. Or in the context of protecting an employee who is safety conscious.

Q. Can you make any judgments one way or another whether the inclusion of such a provision in the collective bargaining agreement ultimately results in the protection of the employees?

A. It helps, in that it is there in black and white in the parties' agreement. That it was of such concern that they chose to put it in writing. And, therefore, when a

grievance comes up to arbitration, within this factual context, the arbitrator has one additional sanction or standard to apply in determining whether management's disciplinary action was just . . . was for cause, or not.

Q. Well, actually, this particular collective bargaining agreement kind of reminds me of the soviet constitution. It gives lots of rights and remedies, none of which are ever enforced, because it would be sheer suicide to ask the authorities to enforce them.

[p. 178] I take it that you believe when there is whistleblower . . . alleged whistleblower protection . . . In this particular agreement . . . collective bargaining agreement, you are going to – The very fact that you would enforce it if the situation were brought to your attention, is a sufficient basis for you to say that it does offer some protection to the employee?

MR. HIPPIE: I'll object to that as incredibly vague and ambiguous.

MR. BOYLE: Well, which part? The part that says the agreement reminds me of the soviet constitution, with lots of rights and remedies for everybody, none of which are ever exercised? And if they are exercised by anybody, the exerciser ends up in Siberia . . . ?

MR. HIPPIE: That, among many other parts of the question.

A. This Mr. Norris, in question, was in the process of enforcing his rights under that contract clause. And if it had continued to come to arbitration, and assuming that I were appointed as the arbitrator, I would be impressed with the fact that the parties had taken the

pains to adopt this kind of protection for this whistleblower safety-conscious-type of employee.

That's what I mean when I say it is 'unusual.' I haven't seen it . . . that I can recall, in other contracts.

* * *

[p. 181] type relief. But that's not to guarantee that the company is going to heed it. Because an arbitrator is called in on a case-by-case basis. He has no continuing authority over the union and the employer. Unless he enjoys a permanent umpire status, which is a special arbitrator status. He is the standing judge of all grievances that are brought to arbitration. They don't select anybody else.

Q. Wouldn't it be easier and of greater deterrent value if in the first case that was brought to your attention you imposed an award of punitive damages to teach the company not to engage in the same conduct again?

MR. HIPPIE: Objection; vague and ambiguous. Incomplete hypothetical. Assumes facts not in evidence. Lacks foundation. Not reasonably calculated to lead to the discovery of relevant evidence.

A. As an arbitrator, I would only respond to a request for punitive damages if it is raised by the grievant or his union. And consider the supporting facts and evidence that he would bring to justify.

Q. So, under certain circumstances, you would award punitive damages?

A. I would certainly consider it. I wouldn't rule it out, I think, is what I'm saying.

Q. Have you ever awarded punitive damages?

A. Perhaps something similar, but not punitive damages, as [p. 182] such . . . like, treble damages . . . you know, that kind of thing. Q. No. I mean, have you ever sat down as an arbitrator, and been furnished with information of what the net worth is of a company and, in an effort to deter that company from ever engaging in that kind of conduct again, made an award in punitive damages?

A. I have not. I -

Q. As - I'm sorry, I interrupted you.

A. - have not imposed punitive damages, as such, that I can recall. It's a rather rare . . . it's a very rare instance that would even be brought up in an arbitration . . . very unique circumstances.

Q. Is the conduct that is alleged in Norris's Complaint, in your opinion, the kind of conduct that would elicit an award of punitive damages?

MR. HIPPI: I'll object to that. Not reasonably calculated to lead to the discovery of relevant evidence, since there are many counts alleged in that Complaint.

Q. I'm saying the conduct . . . the Complaint taken as a whole? Is that the kind of conduct that you would say would elicit . . . should elicit an award of punitive damages in an arbitration?

MR. HIPPI: Objection; vague, ambiguous; fails to . . . incomplete hypothetical. Assumes facts not in evidence. Includes counts other than the Whistleblower

* * *

[p. 191] call "make whole" remedies. And I don't see where what the company would be hit with, would differ that greatly in either case.

You know, I did start out to say what are the remedies in arbitration . . . and besides reinstatement, of course, he could get his whole back pay. He would not lose seniority. He would not lose his accrued vacation. His accrued sick leave. All of the accruals that should have kept accruing and running, would be restored to him. And if he could show . . . you know, out-of-pocket type actual damages, that could be considered in arbitration as well as under the law.

So the company would be hit virtually in the same degree under either way. So it's hard to say whether they have more to lose. If they go through court, though, they're . . . as this case has shown . . . they're in it for a much longer time. They have legal expenses.

Q. Is there a deterrent value in the process itself?

A. I would imagine that there is -

MR. HIPPI: I'll object to that as a vague and ambiguous as to what "process" you're talking about.

MR. BOYLE: Well, the witness certainly knows what I'm talking about.

Q. Please go on.

A. - the threat, or the possibility of being involved in a long litigation is . . . has deterrent aspects to it. That is [p. 192] why, I take it, in this case . . . the company

retrenched from its initial discharge action, and reduced it to a suspension.

Q. Because of fear of a lawsuit?

A. No. In trying to . . . you know, trying to settle . . . resolve this whole thing. Whether it be continuation of arbitration or faced with a court litigation.

Q. Well, you don't consider Exhibit 4 to be a concession by Hawaiian Airlines that its manager or managers may have been wrong, do you?

A. Well, as in all settlements, they try to avoid judgmental assessments of right or wrong. And, in their mind, when they say they are offering to mitigate the punishment, I believe mitigation is a proper word or terminology. Because there is a vast difference in the seriousness of a discharge penalty from one that is suspension of X number of days or weeks. I've forgotten what it was in this case. It is a reduction.

Q. Let's assume for the moment that all of the well-pleaded allegations of the Complaint are true.

May I see the exhibit?

A. (Complying).

Q. As far as you would be concerned, as an arbitrator with the company - Strike that.

Do you have any understanding of what this third [p. 193] paragraph or Mr. Ogden's letter means. "You are hereby warned that any further instance of failure to perform your duties in a responsible manner will result in consideration of more severe disciplinary action to

include discharge." Do you have any understanding of what Mr. Ogden is saying in that letter?

A. Yes. I think it has . . . it reflects at least two elements. One, is that they are applying principles of progressive corrective discipline. In other words, for a series of misconduct management can start with lesser or moderate penalties, and progressively, gradually, in an effort to correct, increase them. And . . . so if they reduce a discharge back to suspension, which is a lesser penalty, they are on the progressive discipline . . . or invoking the progressive discipline track. And they are saying, 'We're going back to square number three, instead of square number one.'

The other is that one of the cardinal elements of arbitral due process is that there has to be adequate notice, or forewarning, of the consequences of misconduct . . . or repetition misconduct. And so it is almost standard customary verbiage that it includes similar language like this. 'If you trip over yourself in the future, for the same kind of thing, this is what's in store for you.' So it's a forewarning . . . 'forewarning' is the word, I guess, we would use.

[p. 194] Q. 'Don't do this again, or next time no Mr. Nice-guy?'

A. Yeah. So that the employee is fully apprised of the consequences of repetitious misconduct.

Q. "Repetitious misconduct" . . . being in this case refusing to sign off on a defective part?

A. That kind of thing.

Q. If Mr. Norris had come to you, could he have gotten special damages, let's say . . . for the cost of, say, going to see a psychologist or psychiatrist?

A. (No audible response).

Q. If he had prayed for it, of course. And if he had made proper application. And showed you . . . 'Mr. Tsukiyama, here's a list of my special damages. And included, herewith, are all of the psychologists that I saw, and all of their bills.'

MR. HIPPIE: I'll object as an incomplete hypothetical.

A. As an arbitrator I would and I could consider that type of request, as long as the foundation of facts are there; with an undergirding of . . . you know, good faith. That I felt this guy is not putting it on. He's . . . he was legitimately emotionally -

Q. Traumatized?

A. - distressed.

Q. Distressed.

* * *

EXHIBIT 8

TED T. TSUKIYAMA
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Attorney and Arbitrator/Mediator.

Born December 13, 1920.

Attended University of Hawaii 1939-1941;

Indiana University A.B., 1947;

Yale Law School, LL.B., 1950.

Office of City and County Attorney, 1951-1956;

Chief Counsel, Honolulu Redevelopment Agency, 1956-1969;

Private law practice since 1956 to present.

Legal Affiliations:

Bar Association of Hawaii;

Supreme Court Bar Examining Committee.

Arbitration Experience and Affiliations:

Ad hoc arbitration, commencing in private labor-management sector from 1958, public labor-management sector from 1970, commercial dispute and construction industry dispute arbitration from 1965;

Member: National Academy of Arbitrators 1966 to present;

Board of Governors: National Academy of Arbitrators 1982-1984;

Vice President: National Academy of Arbitrators 1990-1992;

Chairman: Hawaii Regional Advisory Council, American Arbitration Association 1971-1985;

Board of Directors: American Arbitration Association 1985-1989;

Arbitration panels: Federal Mediation and Conciliation Service; AAA labor and commercial dispute panels; Hurricane Iwa Disputed Claims Settlement Program; Hawaii Court-Annexed Arbitration Panel;

Mediation panels: American Arbitration Association and Mediation Specialists of Hawaii Panel

Member: Asian-African Legal Consultative Committee International Panel; Regional Center for Commercial Arbitration, Kuala Lumpur, Malaysia;

Island Port Arbitrator for Hawaii Longshore Industry and ILWU since 1963;

Chairman: Hawaii Employment Relations Board 1964-1974;

National Association of State Labor Relations Agencies: Vice President 1964-1965; President 1966-1967;

Industrial Relations Research Association - Hawaii Chapter: President 1970-1971

Case Load: Completed over 600 arbitration decisions from 1958 to date.

Completed over 40 mediation and mediation-arbitration (med-arb) cases.

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Attorneys for Plaintiff
 GRANT T. NORRIS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
 STATE OF HAWAII

GRANT T. NORRIS,	)	Civil No. 87-3894-12
Plaintiff,	)	(Other Civil Action)
vs.)	
HAWAIIAN AIRLINES, INC.,	)	AMENDED
Defendant.	)	NOTICE OF
	)	REMAND;
	)	EXHIBITS "A" - "B";
	)	CERTIFICATE OF
	)	SERVICE
GRANT T. NORRIS,)	
Plaintiff,	)	(Filed
vs.	)	Sept. 9, 1991)
PAUL J. FINAZZO; HOWARD	)	Trial Date:
E. OGDEN; HATSUO HONMA;	)	May 11, 1992
and DOES 1-50,	)	Civil No. 89-2904-09
Defendants.	)	Trial Date:
	)	May 11, 1992

AMENDED NOTICE OF REMAND

I HEREBY CERTIFY that attached hereto as Exhibits "A" and "B" are true, correct, and certified copies of (1) the Memorandum and Order, filed on March 28, 1998

[sic], in *Norris v. Hawaiian Airlines, Inc.*, Civil No. 88-00010 HMF and (2) the Memorandum and Order, filed on November 21, 1988, in *Norris v. Hawaiian Airlines, Inc.*, Civil No. 88-00010 HMF.

It appears that when Norris filed the Notice of Remand with the Clerk of the First Circuit Court, State of Hawaii on August 29, 1991, which attached as Exhibit "A" the letter from Walter A.Y.H. Chinn, Clerk of the United States District Court for the District of Hawaii, dated August 27, 1991, along with the certified copies of the above-mentioned Memoranda and Orders, the Clerk of the First Circuit Court, State of Hawaii did not include as part of the filed Notice of Remand the two certified copies of the Memoranda and Orders. The two certified copies of the Memoranda and Orders were returned to Norris's counsel.

In an attempt to ensure that certified copies of the federal court's March 28, 1988 and November 21, 1988 remand orders are filed with the First Circuit Court, State of Hawaii, Norris submits this Amended Notice of Remand, to which the certified copies of the remand orders are attached as Exhibits "A" and "B." These orders remanded Counts I through IV of the complaint in the case entitled *Grant T. Norris v. Hawaiian Airlines, Inc.*, Civil No. 88-00010 HMF, to the First Circuit Court of the State of Hawaii, in Civil No. 87-3894-12.

DATED: Honolulu, Hawaii, September 9, 1991.

/s/ illegible
 EDWARD deLAPPE BOYLE
 SUSAN OKI MOLLWAY
 ERNEST H. NOMURA
 CADES SCHUTTE FLEMING
 & WRIGHT
 Attorneys for Plaintiff
 GRANT T. NORRIS

EXHIBIT A
 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF HAWAII

GRANT T. NORRIS,	)	Civil No. 88-00010 HMF
Plaintiff,)	
vs.	)	<u>MEMORANDUM AND</u>
	)	<u>ORDER</u>
HAWAIIAN AIRLINES,	)	(Filed March 28, 1988)
INC., a Hawaii corporation,)	
Defendants.)	
)	

Grant Norris (Norris), an airline mechanic formerly employed by Hawaiian Airlines, Inc. (HAL), brought an action against HAL in Hawaii state court for wrongful termination. Norris pled five counts: Count I alleged that Norris was discharged in violation of public policy as expressed in Federal Aviation Act and regulations; Count II alleged a violation of the Hawaii Whistleblowers Protection Act, a state statute that purports to protect employees against retaliatory firings; Count III alleged that Norris had suffered emotional distress as the result of HAL's actions; Count IV sought punitive damages from HAL for allegedly outrageous conduct; and Count V stated a claim for breach of the collective bargaining agreement. HAL removed Norris's action to this court asserting that Norris's state law claims were preempted by federal labor law. Norris has moved to remand, arguing that his claims are not preempted and the federal court is without jurisdiction. HAL opposes the motion and has moved for summary judgment on the grounds

that Norris's claims are preempted by federal law and must be dismissed for failure to exhaust the grievance procedures established by the collective bargaining agreement.

I. FACTUAL BACKGROUND

Norris was employed by HAL as an FAA licensed aircraft mechanic from February 2, 1987 to August 3, 1987. *See* Norris Affidavit, attached to Motion to Remand [hereinafter Norris Aff.] Norris's FAA license carried an Airframe and Powerplant rating which gives the mechanic so rated the authority to approve and return to service an aircraft after the mechanic has made, supervised, or inspected certain repairs performed on the aircraft. *See* 14 C.F.R. §§ 65.85, 65.87 (1987). However, the mechanic may not approve for service any aircraft or part to which repairs have been made that do not conform to the applicable FAA regulations, and any fraudulent entry in any record or report required by the FAA regulations is cause for suspending or revoking the mechanic's FAA license. 14 C.F.R. § 43.12 (1987).

On July 14, 1987, Norris was servicing one of HAL's aircraft and noticed that one of the tires was worn. When the tire was removed Norris discovered that the axle sleeve, which normally has a mirror smooth surface, was scarred and pitted. Such damage to the surface of an axle sleeve can cause the sleeve to rub against the wheel bearing. The heat generated by this friction, combined with the high speed at which the wheel bearing spins on landing, can result in the bearing fusing to the sleeve and the ultimate failure of the landing gear. Norris Aff. at

paragraphs 5-10. Norris believed the part was unsafe and should be replaced, but his supervisor instead ordered the mechanics to hand sand the axle sleeve and put over it a new bearing and tire. *Id.* at paragraphs 11-13. Later the supervisor asked Norris to sign the maintenance record for installation of the tire, but Norris refused to sign unless the supervisor "could show me in the maintenance manual where it said that the axle [sleeve] was in a satisfactory condition." The supervisor did not consult the manual and told Norris that if he did not sign he would be suspended. Norris did not sign and was suspended. The next day he called the FAA and told them that there was a problem with the HAL aircraft he had serviced. *Id.* at paragraphs 15-21.

A termination hearing was held pursuant to Article XV of the collective bargaining agreement and Norris was discharged for insubordination. *See generally* Agreement Between Hawaiian Airlines, Inc. and the International Association of Machinists and Aerospace Workers (AFL-CIO), attached as Exhibit 1 to Motion for Summary Judgment [hereinafter Agreement or collective bargaining agreement]. Norris then filed a grievance regarding his termination and Norris's union representative referred the grievance for a Step 3 hearing pursuant to the Agreement. However, before the Step 3 hearing commenced, HAL issued a letter dated September 10, 1987, mitigating Norris's punishment from termination to a suspension without pay. Exhibit 3 to Motion to Remand, HAL then wrote to the union representative stating HAL's position that since Norris's punishment had been mitigated there was no need for the Step 3 hearing. *Id.*, Exhibit 4. Norris did not respond to HAL's September 10 letter and instead

filed this action in state court. The Step 3 grievance hearing was not held.

II. JURISDICTION

A. Removal Jurisdiction

I conclude at the outset that even if Counts I through IV of Norris's complaint are not preempted by federal labor law, Count V, which states a claim for breach of the collective bargaining agreement, clearly is a claim arising under federal law over which this court have removal jurisdiction. The terms and conditions of Norris's employment with HAL are governed by the collective bargaining agreement, as Norris concedes in Count V of his complaint. The Railway Labor Act (RLA), 45 U.S.C. §§ 151-185 governs labor relationships in the airline industry. *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 685 (1963); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983); *Fechtelkott v. Air Line Pilots Ass'n*, 693 F.2d 899, 902-03 (9th Cir. 1982). A claim for breach of an agreement governed by the RLA arises under federal law. See, *Scott v. Machinists Automotive Trades, District Lodge No. 190*, 827 F.2d 589, 591 (9th Cir. 1987) (claim under § 301 of the LMRA for breach of the collective bargaining agreement removable as a federal question); *Schroeder, supra*, at 191 (claims based on conduct not authorized by a collective bargaining agreement governed by the RLA arose under federal law and removable). Finally, this federal question "is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987).

Since federal jurisdiction at least over Count V exists, HAL could properly remove the entire action. *Lepucki v. Van Wormer*, 765 F.2d 86 (7th Cir. 1985), cert. denied, 474 U.S. 827 (1985); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1430 (9th Cir. 1984). Once an action has been properly removed on the basis of a federal claim, the district court may exercise jurisdiction over pendent state claims even if the federal claim has been dismissed,¹ or it may, in its discretion, remand the state claims to state court. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 622 (1988); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966); *Salveson, id.* In this case, however, HAL urges that Counts I through IV are completely preempted by federal labor law and thus are not pendent state claims subject to the court's discretion to remand.² If Norris's claims are completely preempted there are no state claims

¹ In its motion for summary judgment, discussed *infra*, HAL argues that Count V, as well as Counts I through IV which it believes preempted, must be dismissed for Norris's failure to exhaust the grievance procedures of the collective bargaining agreement.

² HAL argues that the preemptive force of the RLA is so extraordinary that it converts ordinary state common law claims into federal claims. HAL acknowledges that if federal preemption is asserted as a defense to state law claims, those claims are not converted into federal law claims. Norris argues that HAL is simply asserting preemption as a defense. To the extent that these arguments are addressed to the question of removability, they need not be resolved since I have concluded that the complaint was properly removed on the basis of Count V even if Counts I through IV are not preempted. However, these arguments are also pertinent to the question whether any claims can be remanded to state court. See *Price v. PSA, Inc.*, 829 F.2d 871, 875 (9th Cir. 1987). They are therefore discussed *infra*.

to be remanded to state court. *Price v. PSA, Inc.*, 829 F.2d 871, 875 (9th Cir. 1987) (if state law claims are completely preempted by RLA, district court has no discretion to remand claims to state court). If, on the other hand, Norris's claims are not completely preempted then this court has no jurisdiction, other than pendant, over those claims and they may be remanded to state court if appropriate. See, *Carnegie-Mellon, supra*, 108 S.Ct. at 622 (court has discretion to remand pendent state law claims). The question is thus whether Counts I through IV are preempted.

B. Preemption

In some instances the preemptive force of a federal statute will be "so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.'" *Caterpillar*, 107 S.Ct. at 2430. if an area of state law has been completely preempted, "any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* Federal labor law, especially as developed under § 301 of the Labor Management Relations Act (LMRA), is an area in which the complete preemption doctrine is often applied. *Id.*

At the outset HAL urges that the preemption analysis developed under § 301 of the LMRA is equally applicable to a case involving the RLA, citing *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1045 (7th Cir.), cert. granted, 108 S.Ct. 226 (1987). I have some doubt that this is so in view of the recent decision of the Ninth Circuit in *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987).

In *Price* the Ninth Circuit declined to extend the broad rule of preemption developed under § 301 of the LMRA to claims involving a collective bargaining agreement governed by the RLA. 829 F.2d at 875-76. Instead, the Court held that a state law claim is completely preempted by federal law only if Congress has " 'clearly manifested an intent' to convert a state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 876. Because the RLA does not contain a civil enforcement provision, as does § 301, the Court found that "Congress has not indicated, as it did with LMRA § 301 . . . , that the RLA is 'so powerful as to displace entirely any state cause of action.'" *Id.* (quoting *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542, 1546 (1987)). The Court held:

Absent a direct expression of congressional intent to create federal jurisdiction for all causes of action within the scope of Section 2, Fourth of the RLA, we believe we must abide by the well-pleaded complaint rule. Congress or the Supreme Court can steady us if either finds our step faulty. We hold that plaintiff's state law causes of action are not completely preempted by the RLA.

Id. at 876. The Court in *Price* conceded, however, that PSA might still argue federal preemption as a defense to the plaintiff's state law claims. *Id.* at 876.

Price involved two general claims under state law: 1) claims predicated on the violation of public policy expressed in California Labor Code §§ 922 and 923, which prohibit retaliation for union organizing activities, and 2) claims based on violation of the public policy inherent in

California Code of Civil Procedure § 1209(a)(5), which prohibits disobedience of lawful court orders. *Id.* at 872. The RLA, in § 2, Fourth, 45 U.S.C. § 152, Fourth, prohibits carriers from denying or in any way questioning the right of employees to unionize. None of the provisions of § 2 of the RLA contain a civil enforcement provision.

Price relied on two recent Supreme Court cases which considered federal preemption of state law claims. First, in *Caterpillar v. Williams*, 107 S.Ct. 2430 (1987), the Supreme Court held that state law claims for breach of individual employment contracts were not completely preempted by § 301 of the LMRA. In *Caterpillar* the Court emphasized that an employee "covered by a collective bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied on is not a collective bargaining agreement." *Id.* at 2431-32 (emphasis in original). The *Caterpillar* Court noted that even though the state law claims were not completely preempted so as to permit removal jurisdiction, the employer could nevertheless argue as a defense in state court that the state law claims were preempted by federal law. *Id.* at 2432. The Court stated that a claim would be preempted when "the plaintiff invokes a right created by a collective bargaining agreement," but not when the defendant merely injects the federal question as a defense to a state law claim. *Id.* at 2433.

In the second case, *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987), the Supreme Court held that an employee's state law claims for breach of contract and wrongful termination were completely preempted by ERISA. 107 S.Ct. at 1548. The Court stated that it was

deciding the question expressly left open in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), to wit: whether state law claims within the scope of ERISA's civil enforcement provision, § 502(a), 29 U.S.C. § 1132(a), were completely preempted. *Id.* at 1547. The *Metropolitan* Court found complete preemption, however, only because "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA." *Id.*

The Court noted that "[f]ederal pre-emption is ordinarily a defense to plaintiff's suit" and as such "does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to a federal court." *Id.* at 1546. In a companion case, *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987), the Court analyzed the preemptive effect of ERISA as a defense and held that state common law tort and contract claims for improper processing of a claim for benefits were preempted by ERISA. *Id.* at 1556. The *Metropolitan* Court went further and found that Congress had so completely preempted the area that any civil complaint within the scope of ERISA's civil enforcement provision was necessarily federal in character and subject to removal to federal court. The Court stated:

Even with a provision such as [ERISA's civil enforcement provision] that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . , however, we would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

But the language of the jurisdictional subsection of ERISA's civil enforcement provision closely parallels that of § 301 of the LMRA. . . . [The legislative history of the provision also] sets out this clear intention to make [ERISA] suits brought by participants or beneficiaries federal questions for the purposes of federal court jurisdiction in a like manner as § 301 of the LMRA.

107 S.Ct. at 1547 (citations omitted).

The Ninth Circuit in *Price* found that the RLA did not have the preemptive force of ERISA or § 301 of the LMRA because it contained no similar civil enforcement provision and revealed no clear congressional intent to "create federal jurisdiction for all causes of action within the scope of Section 2, Fourth of the RLA." 829 F.2d at 876. Although *Price* was concerned only with Section 2, Fourth of the RLA, a section not applicable to Norris's claims, I believe the rationale of *Price* applies equally to this case. Although HAL argues that the RLA preempts Norris's claims, it does not identify any particular provision of the RLA that it believes preemptive. Section 2, First and Second of the RLA arguably cover Norris's claims, but neither of these provisions has a civil enforcement provision. In sum, I conclude that under *Price* Norris's state law claims set forth in Counts I through IV of his complaint are not completely preempted by the RLA and this court therefore does not have subject matter jurisdiction over those claims except to the extent that they are pendent to a federal claim.³

³ Even though Count I alleges a discharge in violation of public policy, as expressed in FAA regulations, it does not state

I emphasize that HAL may still have a good federal defense to Norris's state law claims. The RLA does exhibit a congressional intent that certain disputes between an employee and employer covered by the RLA be resolved only by the grievance procedures specified and not by the courts. *Atchison T & S.F. Ry. Co. v. Buell*, 107 S.Ct. 1410, 1414 (1987); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972); *Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1289-92 (9th Cir. 1986). It may be that the state courts do not have jurisdiction over Norris's claims because of the preemptive effect of the RLA's administrative grievance procedures. But such preemption is a defense which can be addressed by the state courts; it does not convert Norris's claims into federal claims for jurisdictional purposes.

I am also aware of the cases from this Circuit which have held, contrary to *Price*, that state law claims implicating a collective bargaining agreement covered by the RLA present a federal question and are removable to federal court. See, e.g. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978). I am bound, however, to follow the most recent decisions of the Ninth Circuit. If I have not

on its face a federal claim. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (incorporation of a federal standard in a state law cause of action does not create a federal question when Congress has not provided a private action for violations of that standard).

read *Price* correctly, the Ninth Circuit can "steady" me if it finds my "step faulty." *Price*, 829 F.2d at 876.

III. DISPOSITION OF CLAIMS

I have concluded that this court has federal question jurisdiction only over Count V. The remaining four state law claims are subject only to this court's pendant jurisdiction. HAL has moved for summary judgment on all of Norris's claims on the grounds that Norris has failed to exhaust the RLA's administrative grievance procedures. I conclude that summary judgment is inappropriate since it is a ruling on the merits, and the basis for the motion is lack of jurisdiction which is more properly treated as a motion to dismiss under Fed. R. Civ. P. Rule 12(h)(3). See *Miller v. Norfolk & W.R. Co.*, 834 F.2d 556, 562 (6th Cir. 1987) (where defense is that claim was really a minor dispute subject to RLA grievance procedures, claims may be dismissed on jurisdictional grounds but cannot be decided on the merits).

I conclude, however, that the claim Norris has stated in Count V of his complaint must be dismissed for lack of jurisdiction because it is subject to the exclusive administrative grievance procedures of the collective bargaining agreement and the RLA. A collective bargaining agreement between an air carrier and its employees is subject to the provisions of the RLA, 45 U.S.C. § 181. A claim for violation of a right secured by the collective bargaining agreement is subject to RLA Section 2, First and Second, 45 U.S.C. § 152, and the grievance procedures specified in Article XV of the collective bargaining agreement and Section 204 of the RLA, 45 U.S.C. § 184. If the parties are

unable to resolve their dispute through the grievance procedures of the collective bargaining agreement, they must submit their dispute to binding arbitration. See Article XVI of the Agreement; *I.A.M.A. v. Republic Airlines*, 761 F.2d 1386, 1389 (9th Cir. 1985) (if dispute arising out of the interpretation of a collective bargaining agreement is not resolved through internal grievance procedures, it may be referred to adjustment board, which has exclusive jurisdiction of dispute). Courts do not have jurisdiction over employment disputes within the exclusive jurisdiction of the arbitration boards established by the RLA. See *Andrews, supra*, 406 U.S. 320 (employee claiming breach of employment agreement must avail himself of grievance procedures established by RLA); *I.A.M.A. v. Alaska Airlines, Inc.*, 813 F.2d 1038, 1039-40 (9th Cir. 1987) (federal courts have no jurisdiction to resolve disputes concerning the application or interpretation of collective bargaining agreements); *I.A.M.A. v. Aloha Airlines*, 776 F.2d 812, 813 (9th Cir. 1985) (same).

In Count V Norris claims that certain acts of HAL, in particular those reflected in HAL's September 10, 1987 and September 14, 1987 letters, constitute a breach of the collective bargaining agreement. It is not disputed that Norris did not file a grievance with respect to the HAL conduct complained of in Count V or that the grievance process initiated with respect to HAL's conduct complained of in other paragraphs of the complaint was not completed. Since Norris's claim for breach of the collective bargaining agreement involves an interpretation of the terms of that agreement and is subject to the grievance and arbitration provisions of the Agreement and the

RLA, this court is without jurisdiction to entertain that claim.

Finally, I conclude that the state law claims in Counts I through IV should be remanded to state court. This court has pendant jurisdiction over these claims because they arise out of the same nucleus of operative facts. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). However, pendant jurisdiction is a doctrine of discretion, not of right, *id.* at 726, and I conclude that the state law claims should be remanded to state court rather than disposed of by this court. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 622 (1987). I recognize that relevant to the exercise of discretion is whether "the allowable scope of the state claim implicates the federal doctrine of preemption," *Gibbs* at 727, and that preemption is an issue here. However, this is just one factor a court can consider when exercising its discretion. A remand, rather than dismissal, of state law claims is appropriate when it will avoid additional costs to the parties, *Carnegie-Mellon* at 9-10, and when principles of federal-state comity are involved, *id.* Moreover, "[w]hen the single federal-law claim in the action [has been] eliminated at an early stage of the litigation, [there is] a powerful reason to choose not to continue to exercise jurisdiction." *Carnegie-Mellon, id.* at 619. I conclude that these concerns dictate that the Hawaii courts decide whether Norris's state law claims may proceed despite the RLA. Those courts are perfectly capable of deciding the issue, and, indeed, have resolved a similar issue before. See *Puchert v. Apsalud*, 677 P.2d 449 (Haw. 1984) (claim of discharge in retaliation for filing workers compensation claim held not preempted by RLA).

I thus grant the motion to remand in part. I construe the motion for summary judgment as a motion to dismiss under Fed. R. Civ. P. Rule 12(h)(3) and grant the motion in part.

It is therefore ORDERED;

1) that Count V of the complaint be dismissed for lack of jurisdiction;

2) that Counts I through IV of the complaint be remanded to state court.

DATED this 24 day of March, 1988 at Anchorage, Alaska.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States
District Judge

EXHIBIT B
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GRANT T. NORRIS,	)	Civil No. 88-00010 HMF
)	
Plaintiff,	)	<u>MEMORANDUM</u>
	)	<u>AND ORDER</u>
vs.)	
	)	(Filed
HAWAIIAN AIRLINES, INC.,	)	Nov. 21, 1988)
a Hawaii corporation,)	
)	
Defendants.)	
)	

Grant Norris filed a complaint in state court stating five claims against Hawaiian Airlines ("HAL"): wrongful discharge in violation of public policy (Count I), a claim that HAL violated the Hawaii Whistleblowers' Protection Act (Count II), intentional infliction of emotional distress (Count III), a claim for punitive damages for outrageous conduct (Count IV), and a claim for breach of the collective bargaining agreement (Count V). HAL removed the case to federal court asserting federal question jurisdiction. Norris filed a motion to remand and HAL filed a combined opposition and a motion for summary judgment, arguing that the federal court had removal jurisdiction over Norris's claims because those claims were completely preempted by the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* HAL urged the removal preemption under the RLA was analogous to removal preemption under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and, relying on Section 301

cases, argued that this court had federal question jurisdiction. HAL then argued that the federal court lacked jurisdiction over the claims because they were subject to the exclusive arbitral remedies of the RLA.

I held that the case was initially removable because the claim for breach of the collective bargaining agreement was a federal claim arising under federal law. I dismissed that claim for lack of jurisdiction because such a claim is subject to the exclusive jurisdiction of the RLA grievance processes which had not been exhausted. As to the remaining claims, I held that "complete" or removal preemption analysis developed under Section 301 was inapplicable to claims arguably within the scope of the RLA because the RLA did not contain a civil enforcement provision such as that found in ERISA and Section 301. I relied on *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1732 (1988) which held that state law claims arguably within the scope of section 2, Fourth of the RLA were not completely preempted for purposes of removal jurisdiction because the RLA contained no civil enforcement provision. Although Norris's claims were not within section 2, Fourth of the RLA, but rather section 2, First or Second, I found *Price* applicable since section 2, First and Second also contain no civil enforcement provision. Although I recognized that HAL might have a valid federal defense to Norris's state claims (i.e. that those claims were "minor disputes" subject to the exclusive jurisdiction of the RLA grievance procedures), I held that those claims could not be recharacterized as federal claims by analogy to Section 301 and hence did not create federal jurisdiction. Although I could have exercised pendant jurisdiction over the state claims, I

exercised my discretion to remand the claims to state court.¹

HAL moved for reconsideration arguing that I had misread *Price* since *Price* did not directly involve a collective bargaining agreement and earlier Ninth Circuit cases suggested that "complete preemption" applicable under Section 301 also applied to the RLA. HAL supplemented its motion for reconsideration after the Supreme Court decided *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), which elucidated the proper Section 301 analysis. I scheduled oral argument on the motion and instructed the parties to assume that I agreed that I had misread *Price* and to focus their argument on *Lingle*. At oral argument, therefore, the parties assumed that a Section 301 analysis such as that in *Lingle* applies to claims governed by the RLA.

This area of the law is rather complicated because there are various concepts which are all called "preemption." In this case two preemption doctrines converge. The first is what may be called "claim preemption" or removal preemption and it governs the removability of claims from state to federal court. Under this doctrine a federal court has jurisdiction only over "state court actions that originally could have been filed in federal

¹ If the four remaining claims are state claims then this court has pendant jurisdiction over those claims. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). I have discretion to remand pendant state law claims. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614 (1988). If, however, the four remaining claims can be "recharacterized" as federal claims, then federal question jurisdiction exists over those claims and I have no discretion to remand those claims. See *Price*, 829 F.2d at 875.

court." *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987). Ordinarily a federal defense to a well-pleaded state claim does not give rise to federal question jurisdiction. *Id.* at 2430. In some cases, however, a federal statute may have such an "extraordinary" preemptive force that it converts a state claim to a federal claim providing a basis for federal subject matter jurisdiction. *Id.* Section 301 of the LMRA is such a statute. The second broad preemption doctrine involves various theories of labor law preemption, one of which may be called "forum preemption" and it governs the jurisdiction of any court to hear claims subject to the grievance and arbitration provisions of federal labor statutes such as the RLA or the NLRA. See, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (if activity is arguably subject to § 7 or § 8 of the NLRA, state as well as federal courts must defer to exclusive jurisdiction of NLRB). Although the law is far from clear and cases can be found which do not seem to distinguish the jurisdictional implications of the two doctrines, I believe that "claim preemption" as developed under Section 301 does not apply in this case.²

² Norris could not state a claim under Section 301 of the LMRA because employers who are covered by the RLA are specifically excluded from the definition of employer contained in the LMRA. See 29 U.S.C. § 152(2). An employee who claims that his employer has breached the collective bargaining agreement must pursue the grievance procedures created by the RLA. Neither a federal court nor a state court has jurisdiction over claims subject to the RLA grievance procedures until those procedures have been exhausted. Since Norris has no federal claim similar to a Section 301 claim I believe that preemption under the RLA is merely a federal defense which does not give rise to removal jurisdiction. See, e.g., *Caterpillar Inc. v. Williams*, 107

Thus, I do not believe that Norris's state claims can be "recharacterized" as federal claims for removal purposes pursuant to the analysis developed under Section 301. See generally *Miller v. Norfolk & Western Railway Co.*, 834 F.2d 556 (6th Cir. 1987) (discussing the various preemption doctrines applicable in RLA case and the "difficult and subtle issues" that arise and expressing doubt that Section 301 preemption doctrine applies to RLA cases); see also *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877, 1883 n. 8 (1988) (distinguishing Section 301 preemption from other labor law preemption doctrines).

It is true that whatever state law claims Norris has may be subject to the defense that the claims are within the exclusive jurisdiction of the RLA grievance procedures. See, e.g., *Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1290 (9th Cir. 1986) (any claim that can be characterized as a "minor dispute" under the RLA is within the exclusive jurisdiction of the arbitral authority created by the RLA). However, the issue presently before this court is one of federal subject matter jurisdiction and a federal defense does not provide federal question jurisdiction. See, e.g., *Caterpillar*, 107 S.Ct. at 2432 (fact that defendant may ultimately provide that state claims are preempted by NLRB's exclusive jurisdiction does not establish that they are removable to federal court) (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)); see generally *Franchise Tax Board v. Construction Laborers Trust*, 463 U.S. 1 (1983). Thus I concluded that this court has no federal question jurisdiction over

S.Ct. 2425, 2430 (1987) (ordinarily federal pre-emption is a defense that does not give rise to removal jurisdiction).

Norris's claims even though those claims might be subject to the federal defense of forum preemption.

HAL urges, however, that this court has federal question jurisdiction because Norris's state law claims are completely preempted by the RLA in the same manner that such claims would be completely preempted under Section 301. HAL relies on several cases which have seemingly applied "claim preemption" to RLA cases. *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978); see also *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972).³ None of these cases, however, fully discussed or analyzed the question of removal jurisdiction in light of the recent Supreme Court cases which have elucidated the doctrine. See, e.g., *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). The Ninth Circuit in *Price* adopted a removal analysis which incorporates these decisions and I followed *Price*. However, *Price* did not deal precisely with claims arguably within the scope of a collective bargaining agreement

³ In *Andrews* an employee subject to the RLA filed a claim in state court for breach of contract based on a wrongful discharge. The Supreme Court held that the claim was subject to the grievance and arbitration procedures of the RLA since the source of the employee's right was the collective bargaining agreement. The basis for federal jurisdiction in *Andrews* was unclear. Nevertheless, the Supreme Court in *Andrews* relied in part on cases considering preemption under Section 301.

under the RLA and may not apply in this case. Furthermore, even if *Price* could be construed to apply in cases such as this, it may be inconsistent with the earlier Ninth Circuit decisions in *Beers*, *Schroeder* and *Magnuson* which found that removal of state law claims that were subject to RLA preemption was proper. Since *Price* was a panel decision and not *en banc* I must follow *Beers*, *Schroeder* and *Magnuson* and determine whether Norris's claims are completely preempted for removal purposes by the RLA. See, e.g., *Antonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n. 6 (9th Cir.), *withdrawn*, 787 F.2d 462 (9th Cir. 1985), *reversed*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*) (panel decision is the law of the circuit until overruled by *en banc* court); *LeVick v. Skaggs Co., Inc.*, 701 F.2d 777, 778 (9th Cir., 1983) (absent *en banc* decision, prior panel decision is controlling authority for subsequent panel).

I. Claim Preemption

The parties rely on the recent Supreme Court case *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), and several recent Ninth Circuit cases construing *Lingle*. *Newberry v. Pacific Racing Association*, 854 F.2d 1142 (9th Cir. 1988); *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988); *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988). In *Lingle* the Supreme Court held that a worker's claim that she had been discharged in violation of the Illinois Workers' Compensation Act was not preempted under Section 301. The Court held that a state law claim is preempted by Section 301 only if application of state law "requires" the interpretation of a collective bargaining agreement. 108 S.Ct. at 1885. To determine whether the state law claim was preempted, the Supreme

Court first looked to the elements of the state law claim. *Id.* at 1881-82. In *Lingle* the state law tort required a showing that (1) the employee was discharged or threatened with discharge, and (2) the employer's motive in discharging or threatening to discharge was to deter the employee from exercising her rights under the Illinois Workers' Compensation Act. *Id.* at 1882. The Court concluded that the state tort claim did not require an interpretation of the collective bargaining agreement:

Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of the collective bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. Thus the state law remedy in this case is 'independent' of the collective bargaining in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state law claim does not require construing the collective bargaining agreement.

Id. (citations omitted). The Court rejected the analysis relied on by the court of appeals and concluded that even though a state law analysis "might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause" under the terms of the collective bargaining agreement, such "parallelism" does not render the state law claim preempted by Section 301. *Id.* at 1883. The Court reemphasized that Section 301 preemption:

merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a state may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes.

Id. (footnotes omitted). The Court also rejected any analysis that would turn on whether the state law rights were "negotiable" or "nonnegotiable" since certain "nonnegotiable" state law rights may still require interpretation of a collective bargaining agreement. *Id.* at 1882 n. 7.

The *Lingle* Court reaffirmed the approach adopted in *Allis-Chalmers Corp. v. Lueck*, 417 U.S. 202 (1985). In *Lueck* the Supreme Court held that a state law claim for bad-faith handling of an insurance claim was preempted by Section 301 when applied to the handling of a claim under a disability plan included in a collective bargaining agreement. In *Lueck* the court held that a state tort law is preempted if it:

confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state law purports to

define the meaning of the contract relationship, that law is pre-empted.

Id. at 213. The tort in *Lueck* was preempted because "the tort exists for breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself.'" *Id.* at 216 (quoting *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 1, 13-16, 235 N.W. 413, 414-15 (1931)). Since the "duties imposed and rights established through the state tort . . . derive from the rights and obligations established by the contract," *id.* at 217, the state tort was preempted by Section 301.

In *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988) the Ninth Circuit held that an employee's state law claim alleging discrimination based on handicap, in violation of an Oregon statute protecting the physically handicapped, was not preempted by Section 301. Miller claimed that he was discharged in violation of the Oregon statute and sued his employer in state court. His employer then removed the action to federal court, asserting that Miller's claims were inextricably intertwined with the terms of the pertinent collective bargaining agreement. The court reasoned:

If a court can uphold state rights without interpreting the terms of a [collective bargaining agreement], allowing suit based on the state rights does not undermine the purpose of section 301 preemption: guaranteeing uniform interpretation of terms in collective bargaining agreements. . . . [W]e cannot accept defendants' claim that parallel protection in collective bargaining agreements mandates preemption. . . .

Finding preemption whenever [collective bargaining agreements] offer protections similar to those provided by state law is inappropriate because it fails to distinguish between state laws that require interpretation of the terms in a [collective bargaining agreement] and state laws that disallow all agreements to particular terms.

Id. at 545-47 (citations omitted). The Ninth Circuit found that the Oregon handicap statute as construed by the Oregon Supreme Court did not require interpretation of any terms of the collective bargaining agreement because the employee's rights under the statute were not controlled by the question of whether or not the employer acted in good faith or on reasonable grounds. *Id.* at 549. Instead, an employee's rights under the statute depended only upon a factual inquiry as to whether the employee can or cannot do the job in a satisfactory manner. *Id.*,⁴ see also *Ackerman v. Western Electric Co.*, slip op. (9th Cir., November 8, 1988).

⁴ Although *Miller* was originally decided without reference to *Lingle*, in an amended opinion the Ninth Circuit stated that *Lingle* "confirms the approach we have taken in this opinion." *Miller*, slip op. at 10188 (9th Circuit, August 24, 1988).

In *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142 (9th Cir. 1988) the Ninth Circuit considered whether an employee's claims for breach of an implied covenant of good faith and fair dealing and intentional infliction of emotional distress were preempted under Section 301. *Newberry* had initially filed her claims in state court and the defendant had removed the action to federal court. The Ninth circuit found that *Newberry's* claims were preempted because her claims "require[d] [the court] to interpret the specific language of the [collective bargaining] agreement's terms. *Id.* at 1147-48.

Thus the question whether a state law claim is preempted by Section 301 depends first upon an analysis of the state law claim asserted. If an element of the state law claim is derived from or dependent upon a right or duty established by contract and the contract at issue is a collective bargaining agreement, then the state law claim will be preempted. On the other hand, if the elements of the state law claim exist independently of any contract then the state law claim will not be preempted. The fact that the collective bargaining agreement may establish similar or parallel rights does not establish preemption, nor does the fact that certain facts may be common to both an inquiry conducted pursuant to the agreement and an inquiry required by a state law analysis.

II. State Law

A. Hawaii Whistleblowers' Protection Act

Norris has claimed that HAL discharged him in violation of the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. § 378-61 *et seq.* The Act provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

- (1) The employee . . . reports or is about to report to a public body, verbally or in writing, a violation or suspected violation of a law or rule adopted pursuant to the law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false; . . .

Haw. Rev. Stat. § 378-62. The Act confers a civil cause of action for violations of the Act. Haw. Rev. Stat. § 378-63. The Act also provides that it "shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement." Haw. Rev. Stat. § 378-66(a). Finally, the Act States:

Where a collective bargaining agreement provides an employee rights and remedies superior to the rights and remedies provided herein, contractual rights shall supercede [sic] and take precedence over the rights, remedies, and procedures provided in this part. Where a collective bargaining agreement provides inferior rights and remedies to those provided in this part, the provisions of this part shall supercede [sic] and take precedence over the rights, remedies, and procedures provided in the collective bargaining agreement.

Haw. Rev. Stat. § 378-66(b).

The Hawaii courts have yet to construe the scope of this Act or the nature of the cause of action conferred by the Act. However, several other states have similar acts which have been considered by the courts. Michigan, in particular, has a whistleblowers' act that is virtually identical to Hawaii's act and have been construed by the courts of that state. See *Hopkins v. City of Midland*, 404 N.W.2d 744 (Mich. App. 1987); *Tuttle v. Bloomfield Hills School Dist.*, 402 N.W.2d 54 (Mich. App. 1986). In *Hopkins* the court set forth the prima facie elements of a claim under the whistleblowers' act:

[P]laintiff must prove: (1) that plaintiff was engaged in protected activity as defined by the

act; (2) that plaintiff was subsequently not promoted [or discharged]; and (3) that a causal connection exists between the protected activity and the failure to promote [or discharge].

404 N.W.2d at 751. If the plaintiff makes out a prima facie case, the burden shifts to the defendant to show some nonretaliatory reason for the discharge. *Id.* If the defendant shows a nonretaliatory reason for the discharge, the plaintiff may show that the reason proffered [sic] by the defendant was only a pretext. *Id.*

None of the elements of a claim under the Whistleblowers' Act is derived from or depends upon a right conferred by a collective bargaining agreement or any other contract. The elements of a claim under the Act are, in fact, similar to the elements of the claim which the *Lingle* court found not preempted. 108 S.Ct. at 1882 (employee must show discharge and that employer's motive in discharge was to deter employee from exercising rights under Act). In this case, as in *Lingle*, the existence of a cause of action turns on the "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer." *Id.* Moreover, to defend against a claim under the Act in this case, as in *Lingle*, the employer must show that it had a non-retaliatory reason for the discharge, a "purely factual inquiry [which] likewise does not turn on the meaning of any provision of a collective bargaining agreement. *Id.*

HAL argues that a claim under the Whistleblowers' Act is preempted because that Act "explicitly requires the court to interpret the rights and remedies of any applicable collective bargaining agreement" in Section 378-66(b). Third supplemental Memorandum in Support of Motion

for Reconsideration at 11. While I agree that the Act may require a court to compare the rights and remedies available to an employee under the Act with any rights and remedies available to an employee under an applicable collective bargaining agreement, I do not agree that this compels the conclusion that any claims under the Act are preempted. First, the Act makes clear that the rights and remedies it confers are independent of any similar or contrary provisions of a collective bargaining agreement.⁵ An employee who states a claim under the Act may recover irrespective of any provisions of his collective bargaining agreement. Second, although an employee may be entitled to *additional relief* under a collective bargaining agreement, a collective bargaining agreement cannot *diminish* his statutory rights. Thus an employee's substantive rights *under the Act* are independent of the terms of any collective bargaining agreement. Finally, the Supreme Court in *Lingle* explicitly rejected the argument HAL advances here:

A collective bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. . . . although federal law would govern the interpretation of the agreement to determine the

⁵ See, e.g., *Hopkins*, 404 N.W.2d at 749 (construing Michigan Act):

[T]he act creates rights belonging to individual employees, not collectively represented groups. The substantive provisions of the act do not depend on whether an employee is subject to a collective bargaining agreement.

proper damages, the underlying state law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S., at 211, 105 S.Ct., at 1911, 'not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by § 301. . . .'

108 S.Ct. at 1885 n. 12 (citations omitted). Norris's claim under the Hawaii Whistleblowers' Protection Act exists completely independently of any provisions of his collective bargaining agreement: no element in his *prima facie* case or in the possible defense requires or depends on any interpretation of his collective bargaining agreement. The provision of the Act ensuring that any additional rights and remedies provided in a collective bargaining agreement are not limited by the Act has no impact on Norris's substantive rights under the Act.⁶

III. Wrongful Discharge in Violation of Public Policy

Norris has also stated a claim for wrongful discharge in violation of public policy, claiming that his discharge was "in violation of the public policy expressed in the

⁶ The Michigan courts have also concluded that claims under its whistleblowers' act are independent statutory rights. *Hopkins*, 404 N.W.2d at 750; *Tuttle*, 402 N.W.2d at 56-57.

Federal Aviation Act and the Federal Aviation Regulations." Norris relies on *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982) in which the Hawaii Supreme Court held that "an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy." *Id.* at 631.

HAL first argues that this claim is preempted because Norris alleges a violation of federal public policy rather than state public policy, citing *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1486 (1984). The Ninth Circuit has noted that *Olguin* was decided before *Allis-Chalmers* and is "no longer binding precedent." *Miller*, 850 F.2d at 549 (citing *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 565-66 (9th Cir. 1987)). *Olguin* is in any event distinguishable. The court in *Olguin* concluded that the plaintiff "cannot now seek protection in state law" because Arizona "has little interest in enforcing federal law." The Supreme Court of Hawaii, however, has recognized that the state tort of wrongful discharge in violation of public policy includes allegations that the discharge violated a federal policy. *Parnar*, 652 P.2d at 631 (finding the relevant public policy in the federal antitrust laws).

HAL also argues that Norris's claim is preempted because the Hawaii Supreme Court would not extend the *Parnar* remedy to an employee covered by a collective bargaining agreement. HAL notes that *Parnar* discussed the state tort as an exception to the "at-will" doctrine and thus concludes that the tort of wrongful discharge in violation of public policy applies only to "at-will" employees. Norris notes that the *Parnar* court did not explicitly limit its holding to "at-will" employees and that

some states have extended the tort to employees covered by a collective bargaining agreement. HAL counters that other states have limited the tort to "at-will" employees. I conclude that I need not resolve this issue because it involves the merits of Norris's claim and is inapposite to the only question presently before me: whether this court has federal question jurisdiction over a claim for wrongful discharge in violation of public policy. To determine this issue I must simply look to the claim alleged in the complaint and, assuming that the claim is valid, apply *Lingle* to determine whether the claim is preempted by federal law. If the claim is not preempted this court has no jurisdiction and cannot reach the merits. If the claim is preempted this court may reach the merits and determine whether the tort would apply to an employee such as Norris.

The question under *Lingle* is whether a claim for wrongful discharge in violation of public policy is a claim derived from or dependent on the terms of a collective bargaining agreement.⁷ To state a claim for wrongful discharge in violation of public policy, an employee must show (1) that there is a clear mandate of public policy; and (2) that his discharge was motivated by reasons that contravene a clear mandate of public policy. See generally *Parnar*, 652 P.2d at 631-32; *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984) (*en banc*). Once the

⁷ HAL's argument that the state tort does not apply to employees covered by a collective bargaining agreement seems to answer this question: if the claim exists only for "at-will" employees who do not have a collective bargaining agreement, then the claim probably does not derive from or depend on the terms of a collective bargaining agreement under *Lingle*.

employee has made this threshold [sic] showing, the burden shifts to the employer to show that the discharge was for reasons other than those alleged by the employee. *Thompson*, 685 P.2d at 1089.

This cause of action, like the cause of action in *Lingle*, does not require an interpretation of the collective bargaining agreement. The public policy is not found in the collective bargaining agreement but in "a constitutional, statutory, or regulatory provision or scheme." *Parnar* at 631. The motivation of the employer is a "purely factual" question. *Lingle*, 108 S.Ct. at 1882. To defend against the claim an employer must show that it was not motivated by a reason that contravenes public policy: "this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. *Id.* I therefore conclude that Norris's claim that HAL discharged him in violation of public policy is not preempted under *Lingle*. See also, e.g., *DeSoto v. Yellow Freight Systems, Inc.*, 851 F.2d 1207 (9th Cir. 1988) (reversing decision reported at 820 F.2d 1434 and holding that employee's claim that he was discharged for refusing to violate state law was not preempted under *Lingle*); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987), cert. denied, 108 S. Ct. 2819 (1988) (claim for wrongful discharge in violation of public policy not preempted by section 301).⁸

⁸ The fact that the collective bargaining agreement also provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action" does not mandate a finding of preemption since *Lingle* made clear that "such parallelism" between a state cause

IV. Emotional Distress

Norris asserts a claim for emotional distress, alleging that HAL's actions, "including the manner in which Norris's discharge hearing was conducted by a kangaroo court, the manner in which Norris was intimidated under pain of suspension and/or discharge to falsify aircraft maintenance records, and the manner in which Norris was threatened by the Assistant Director when the latter had been notified of Norris' report to the FAA."

In Hawaii a defendant may be liable for intentional infliction of emotional distress if his acts were "unreasonable," which is construed to mean "without just cause or excuse and beyond all bounds of decency" or "outrageous." *Chedester v. Stecker*, 643 P.2d 532, 535 (Hawaii 1982). The Ninth Circuit has noted that "[b]ecause the tort requires inquiry into the appropriateness of the defendant's behavior, the terms of the [collective bargaining agreement] can become relevant in evaluating whether the defendant's conduct was reasonable" since actions permitted by the agreement "might be deemed reasonable." *Miller*, 850 F.2d at 550. The *Miller* court concluded that in emotional distress cases independence from the collective bargaining agreement will be difficult to find. The Court noted, however, that these considerations

do not lead to preemption of all emotional distress claims. Such claims may not be preempted if the particular offending behavior has been

of action and rights under the collective bargaining agreement does not require a finding of preemption. 108 S.Ct. at 1883. See also *Ackerman*, slip op. at 13902.

explicitly prohibited by mandatory statute or judicial decree, and the state holds violation of that rule in all circumstances sufficiently outrageous to support an emotional distress claim.

Id. at n. 5. I concluded that Norris's emotional distress claim is not preempted to the extent that it is based upon conduct that is prohibited by the Hawaii Whistleblowers' Protection Act or the tort of wrongful discharge in violation of public policy. Since I have concluded that Norris' claims against HAL based the whistleblowers' act and the state tort are not preempted, a claim for emotional distress based on the same conduct is not preempted. The Hawaii courts may determine that conduct in violation of the Act or public policy is *per se* outrageous. The conduct which forms the basis for the emotional distress claim is not controlled by the collective bargaining agreement but by independent state laws. However, Norris's emotional distress claim is preempted to the extent that it is premised on the conduct of the employer in carrying out the procedures established by the collective bargaining agreement. See *Newberry*, 854 F.2d at 1149 (emotional distress claim preempted where it was clear that claim arose out of discharge and defendant's conduct in investigation leading to discharge).

V. Punitive Damages

Norris had also stated a claim for punitive damages. The claim is based on all the factual allegations of the complaint *except* those alleged in conjunction with the claim that HAL breached the collective bargaining agreement. Complaint, Paragraph 32. I conclude that the claim for punitive damages is not preempted since it is not

premised upon conduct governed by the collective bargaining agreement but rather upon conduct which gives rise to an independent state law claim.

VI. Conclusion

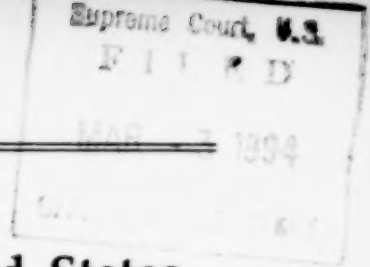
I have reconsidered my previous order and conclude that even if the doctrine of "complete" or removal preemption developed under Section 301 applies to state law claims arguably within the scope of the RLA, Norris's state law claims are not "completely" preempted and hence were not properly removed to this court. I continue to believe, however, that the removal preemption doctrine articulated by the Supreme Court with respect to Section 301 suits is inapplicable to state law claims that are arguably "minor disputes" subject to the exclusive jurisdiction of the RLA grievance procedures. Preemption under the RLA, unlike "complete" preemption under Section 301, is a federal defense which does not provide a basis for federal subject matter jurisdiction.

IT IS THEREFORE ORDERED that, having reconsidered my previous order and reaching the same result, Counts I through IV of the Complaint be remanded to state court and County V be dismissed.

DATED this 16th day of November, 1988 at Anchorage, Alaska.

James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

[Certificate Of Service Omitted In Printing]



In The
Supreme Court of the United States

October Term, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent,

and

PAUL J. FINAZZO, HOWARD E. OGDEN and
HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari
To The Supreme Court For The State of Hawaii

OPENING BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the Hawaii Supreme Court erred in concluding that respondent's state law wrongful discharge claims were not preempted by the Railway Labor Act, 45 U.S.C. Section 151 *et seq.*

LIST OF PARTIES

All parties to the decisions below are contained in the caption of this case. Petitioner Hawaiian Airlines, Inc., a Hawaii corporation, is a wholly owned subsidiary of HAL, Inc., a publicly traded Hawaii corporation. HAL, Inc. is also the parent corporation of West Maui Airport, Inc.

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OPINIONS BELOW

The decision of the Supreme Court for the State of Hawaii in *Norris v. Finazzo, et al.* ("Finazzo"), Civil No. 89-2904-09, is reported at 74 Haw. 235, 842 P.2d 634 (Haw. 1992) (Pet. App. 1a).¹ The companion decision in *Norris v. Hawaiian Airlines, Inc.* ("Hawaiian Airlines"), Civil No. 87-3894-12, is not reported (Pet. App. 27a-29a). The orders of the Circuit Court of the First Circuit, State of Hawaii which were the subject of the appeal are not reported.

JURISDICTION

The judgments of the Hawaii Supreme Court were entered February 16, 1993 (Pet. App. 30a-38a). The petition for a writ of certiorari was filed on June 25, 1993, and was granted on January 21, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, clause 2 of the Constitution, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land

Pertinent sections of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, are reproduced at Pet. App. 42a-45a.

STATEMENT OF THE CASE

On February 2, 1987, Petitioner Hawaiian Airlines, Inc. ("Hawaiian Airlines") employed Grant T. Norris ("Norris") as an airline mechanic (Pet. App. 7a). The terms and conditions

¹ "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari; "Jt. App." refers to the Joint Appendix. Record cites to the record filed in the Hawaii Supreme Court in *Finazzo* and *Hawaiian Airlines* will be ("R." "Volume Number:" "page(s)").

of Norris' employment were governed by a collective bargaining agreement ("CBA") negotiated between Hawaiian Airlines and the International Association of Machinists and Aerospace Workers (AFL-CIO) ("IAM" or "the Union") pursuant to the provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* (Pet. App. 46a-62a).

On July 15, 1987, Norris was involved in a dispute with his supervisor concerning a tire change on an Hawaiian Airlines' jet aircraft (Jt. App. 4). Norris expressed concerns regarding the airworthiness of the "axle sleeve" portion of the tire assembly, but an Hawaiian Airlines' inspector found the axle sleeve to be airworthy and directed that the tire change be completed (*Id.* at 5).

Norris was asked to sign a work record reflecting the tire change, pursuant to Article IV.D.4(a) of the CBA, which provides in relevant part: "An airline mechanic may be required to sign work records in connection with the work he performs." (Pet. App. 49a). Norris refused to sign the record, citing his concern regarding the safety of the axle sleeve, and claiming that he himself had not performed the work in question (Jt. App. 6). Norris' supervisor told Norris that the supervisor and the inspector had signed a work record regarding the condition of the axle sleeve and that Norris' signature for the tire change was not an endorsement of the condition of the sleeve (*Id.* at 82). Nevertheless, Norris would not change his position (*Id.* at 6). After Norris refused to sign the work record, he was held out of service pending an investigation into his conduct in accordance with the CBA (Jt. App. 6).

Articles XV and XVI of the CBA set forth detailed procedures for the adjustment of grievances and other employment disputes and establish an arbitral panel, a System Board of Adjustment ("System Board"), for final and binding resolution of claims through arbitration (Pet. App. 54a-55a). Article XVI.C of the CBA provides that the System Board "shall have exclusive jurisdiction over disputes between any employee covered by this Agreement and the Company and between the Company and the Union, growing out of grievances concerning disciplinary action, rules, rates of pay, or working conditions covered by [the CBA] . . . or out of the

interpretation or application of any terms of [the CBA]. . . ." (Pet. App. 55a).

The CBA grievance process regarding Norris commenced on July 15, 1987, when a step 1 grievance hearing was scheduled for July 31, 1987 (Jt. App. 214). The grievance proceeding focused on whether Norris' failure to sign the work record provided just cause for disciplinary action against him in light of the CBA's requirement that mechanics sign off for work performed (Jt. App. 214-15). Norris took the position that his refusal to complete the requested work record was justified by his questions about the safety of the axle sleeve (*Id.* at 213). Article XVII.F of the CBA provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action" (Pet. App. 60a).

Norris had an opportunity to present his argument at the step 1 grievance hearing on July 31, 1987 (Pet. App. 63a). Norris was present and represented at the hearing by his union representative (Pet. App. 63a; Jt. App. 212). On August 3, 1987, the hearing officer issued a step 1 report finding Norris' refusal to sign to be insubordination and recommending his termination (Pet. App. 63a). At some time between July 15 and August 3, 1987, Norris contacted the Federal Aviation Authority ("FAA") and reported that the axle sleeve he had observed was not airworthy (R. XVII: Deposition of Grant Norris, Vol. 4, Feb. 10, 1990, at 709-10). On August 4, 1987, after the step 1 determination had been made, the FAA contacted Hawaiian Airlines, inspected the axle sleeve and had it removed from the aircraft (Pet. App. 8a).

Pursuant to the CBA, Norris, through the IAM, filed an appeal to the step 3 grievance level regarding the step 1 determination (Jt. App. 208). Prior to the step 3 hearing, Hawaiian Airlines reduced Norris' discipline from a termination to a suspension without pay for the period from August 3, 1987 to September 15, 1987, and ordered him reinstated effective that latter date (Pet. App. 66a).

Norris did not return to work on September 15, 1987, and he took no further steps to pursue his grievance through the

System Board procedures mandated by the CBA (Pet. App. 9a). On December 8, 1987, Norris filed suit against Hawaiian Airlines in the First Circuit Court for the State of Hawaii (Jt. App. 3). In Count I, Norris alleged a common law tort claim that he was wrongfully terminated in violation of public policies embodied within the Federal Aviation Act, 49 U.S.C. § 1301 *et seq.* and the Federal Aviation Regulations, 14 C.F.R. § 21 *et seq.* (collectively "the Federal Aviation laws"), due to his refusal to complete work records regarding the tire change (Jt. App. 7). On September 20, 1989, Norris filed a second suit against three Hawaiian Airlines' managerial employees – Paul J. Finazzo, Howard E. Ogden and Hatsuo Honma ("the Individual Defendants") (Jt. App. 12).² In Counts I and II of the Complaint, Norris alleged common law tort claims that the Individual Defendants had ratified Hawaiian Airlines' wrongful termination of him in violation of the public policies embodied in the Federal Aviation laws (Count I), and in violation of the public policies embodied in the Hawaii Whistleblowers' Protection Act, H.R.S. § 378-61 *et seq.* (Count II) (Jt. App. 16, 17). The suit against the Individual Defendants was consolidated with the *Hawaiian Airlines* suit.

Upon motion by the Defendants, the state circuit court dismissed Count I of the suit against Hawaiian Airlines and Counts I and II of the suit against the Individual Defendants, finding those claims to be preempted by the RLA (Pet. App. 10a). On appeal, the Hawaii Supreme Court reversed the circuit court. In rejecting the RLA preemption defense, the Hawaii Supreme Court applied a preemption test derived from Section 301 ("Section 301") of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, as explicated in *Lingle v. Norge Div. of Magic Chef, Inc.* ("Lingle"), 486 U.S. 399 (1988), and *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 593 A.2d 750 (1991) (Pet. App. 16a-17a). The *Lingle* case held that Section 301 preempts only those

² On December 27, 1993, the circuit court granted Paul J. Finazzo's Motion for Summary Judgment and dismissed the claims against him.

state law claims in which "the application [of state law] requires the interpretation of a collective bargaining agreement." 486 U.S. at 407. In *Maher*, the New Jersey Supreme Court extended the holding of *Lingle* to govern RLA preemption. 593 A.2d at 758. The Hawaii court concluded that, under the *Lingle* standard, Norris' claims were not preempted since resolving those claims, in the court's view, would not require any interpretation of the CBA (Pet. App. 20a). The Hawaii court also concluded, relying on its understanding of this Court's holding in *Consolidated Rail v. Labor Executives' Ass'n* ("Conrail"), 499 U.S. 299 (1989), that RLA adjustment board jurisdiction does not extend to "disputes arising outside a CBA" (Pet. App. 14a).

SUMMARY OF ARGUMENT

This case presents the question of whether Congress intended for the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, to preempt state law claims for wrongful discharge for employees subject to the Act's mandatory dispute resolution provisions. Petitioners submit that, in enacting the RLA, Congress intended for RLA adjustment boards to resolve employment disputes concerning discipline and discharge that grow out of grievances generally or out of the application or interpretation of collective bargaining agreements in the rail and airline industries. The Hawaii Supreme Court's decision, which allows an employee to bypass RLA fora by asserting that a discharge is against "public policy" and does not require interpretation of a collective bargaining agreement, is inconsistent with the language, history and purposes of the RLA and must be reversed.

1. In Part I we show that the RLA by its plain language grants exclusive jurisdiction to RLA adjustment boards to resolve disputes growing out of grievances, including whistleblower discharge claims based on state law violations independent of a bargaining agreement. The legislative history of the RLA supports this construction and further establishes that submission of such disputes to adjustment boards is mandatory and subject to only very limited judicial review.

Congress sought in the RLA to promote stability and continuity of service in the rail and airline industries by establishing a system for uniform, expeditious, and final dispute resolution by adjustment boards composed of individuals knowledgeable in the complexities of those fundamental interstate industries. Those goals would be frustrated if carriers and employees were free – indeed required – to bypass the RLA procedures and attack one another in state courts of their choosing. Finally, the construction urged herein is supported by, and is a logical outgrowth of, this Court's decisions in *Elgin, J. & E. Ry. Co. v. Burley* ("Burley"), 325 U.S. 711 (1945), and *Andrews v. Louisville & Nashville Railroad Co.* ("Andrews"), 406 U.S. 320 (1972). Taken together, those cases recognize that the RLA preempts a state law "wrongful discharge" tort claim even where pled as an "independent" state law violation.

2. In Part II, we demonstrate that Norris' claims are exactly the kinds of disputes Congress intended to be preempted by the RLA. Those claims are common law tort actions for "wrongful discharge" related to safety and whistleblowing. The claims grow out of grievances or out of the interpretation or application of the CBA. Therefore, they are within the mandatory jurisdiction of the System Board pursuant to RLA Section 204 for all the reasons discussed in Part I of this brief.

In addition, the CBA here clarifies any ambiguity that might exist under the RLA as to the possibility that Norris' claims might be viable in state court. Section XVI.C of the CBA specifically grants "exclusive jurisdiction" to the System Board to determine employment disputes "growing out of grievances concerning disciplinary action" (Pet. App. 55a). Furthermore, Article XVII.F of the CBA would require the System Board to consider external law in reviewing Norris' "wrongful discharge" claims because that provision mandates that "[a]n employee's refusal to perform work which is in violation of . . . any local, state or federal health and safety law shall not warrant disciplinary action" (Pet. App. 60a-61a). Finally, Norris' claims involve disputes "growing out of . . . the interpretation or application" of the CBA under

Article XVI.C (Pet. App. 55a) because (1) the agreement must be interpreted to determine whether Norris was "discharged" and (2) Norris' discipline grew out of an application of Article IV.D.4(a) of the CBA, which provides that "[a]n aircraft mechanic may be required to sign work records in connection with the work he performed" (Pet. App. 49a).

Given the breadth of System Board jurisdiction under the CBA's terms and the federal statutory authorization under the RLA for that contractual jurisdiction, Norris was required to present those claims to the System Board. This Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), supports Petitioners' view that arbitration agreements entered into within the scope of federal statutory authorization can properly require arbitration of non-contract-based employment claims. Indeed, the subject matter of Norris' claims – an alleged discharge for raising safety concerns and whistleblowing – is one that is frequently dealt with in arbitration.

3. In Part III, we primarily address the issues of whether the preemption standard for LMRA Section 301 under *Lingle*, 486 U.S. 399 (1988), should be applied to determine RLA preemption and whether the test developed in *Conrail*, 491 U.S. 299 (1989), for distinguishing "major" and "minor" disputes under the RLA should be determinative of the scope of RLA preemption.

The *Lingle* preemption test turns on whether a collective bargaining agreement must be interpreted to resolve a state claim. That test was developed to meet the Congressional objectives underlying LMRA Section 301 – namely, assuring uniform federal common law interpretation of collective bargaining agreements. Section 301 by its terms simply provides for federal court jurisdiction over claims alleging breach of a bargaining agreement. Congress had much broader purposes in mind in the RLA in mandating arbitration by industry adjustment boards of a broad range of disputes, including non-contract-based disputes. Indeed, RLA Section 204 by plain language commits to adjustment boards in the airline industry jurisdiction over disputes growing out of grievances or out of contract application in addition to disputes growing

out of contract interpretation. To apply *Lingle*'s narrow preemption test to RLA preemption would deprive adjustment boards of mandatory jurisdiction over a broad range of disputes which Congress plainly intended the boards to resolve.

In *Conrail*, this Court was presented with a dispute clearly within the jurisdiction of the RLA dispute resolution mechanisms and was required to determine whether the dispute had to be resolved through the negotiation and mediation procedures for "major" disputes or the adjustment board procedures for "minor" disputes. The Court did not address RLA preemption and certainly did not overrule the "omitted case" holding of *Burley*, 324 U.S. 711 (1945), which contemplates adjustment board jurisdiction over non-contract-based disputes such as those presented by Norris' claims. Indeed, *Conrail* quotes the "omitted case" holding of *Burley* with approval. *Conrail* is therefore entirely consistent with the position advanced by Petitioners in Part I, and the facts related to Norris' claims show that those claims are classic examples of "minor" disputes committed to adjustment board jurisdiction.

ARGUMENT

I. STATE LAW "WRONGFUL DISCHARGE" CLAIMS ARE PREEMPTED BY THE RLA.

Article VI of the Constitution of the United States, in commanding that "the Laws of the United States . . . shall be the supreme Law of the Land," gives Congress the power to preempt state actions in areas in which it has the power to legislate. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 5 (1824). The preemptive scope of a federal law is determined by an inquiry in which "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks International Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). Congressional intent to exercise preemptive power may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Even in the absence of specific preemptive language, state action is

preempted where "it conflicts with federal law or would frustrate the federal scheme," or where "the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

Norris must concede, as the Hawaii Supreme Court in the decision below acknowledged, that Congress intended the RLA to preempt some state law "wrongful discharge" claims brought by rail or airline industry employees against their employers (Pet. App. 13a & n. 10). However, erroneously relying on this Court's *Lingle* decision, Norris and the Hawaii court claim that the RLA does not preempt state law wrongful discharge tort actions that do not require interpretation of a collective bargaining agreement (Pet. App. 16a-17a). As explained below, reliance on *Lingle*, an LMRA case, is unfounded in the context of the RLA. The plain language and legislative history of the RLA demonstrate that Congress intended for RLA adjustment boards to resolve employment disputes growing out of the discipline or discharge of an employee, including disputes based on alleged violations of state laws independent of a bargaining agreement.

A. CONGRESS INTENDED FOR DISCHARGE AND DISCIPLINE DISPUTES IN THE RAIL AND AIRLINE INDUSTRIES TO BE RESOLVED THROUGH THE RLA'S PROCEDURES.

1. The Statutory Scheme Contemplates Adjustment Board Resolution of "Wrongful Discharge" Claims.

a) The RLA's Plain Language Encompasses Disputes Outside of the Bargaining Agreement.

By plain language which has remained unchanged since the RLA's enactment in 1926, Congress made clear that RLA adjustment board procedures should be used to resolve

employment disputes beyond those where a breach of a collective bargaining agreement is claimed. The RLA's statement of general purposes includes the following broad description of the disputes Congress intended to be settled through RLA procedures:

The purposes of the chapter are: . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of **all disputes growing out of grievances or out of the interpretation or application of agreements** covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a (4)-(5) (emphasis added).

That Congress expected non-contract-based employment disputes to be resolved through the RLA's processes is also demonstrated by the plain language of Section 2 First of the RLA, which describes the general duties of the parties under the Act:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to **settle all disputes, whether arising out of the application of such agreements or otherwise**, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152 First (emphasis added).

Congress used similarly broad language to describe the scope of disputes committed to rail industry adjustment boards: in Section 3 First (i) and Section 3 Second of the RLA, 45 U.S.C. §§ 153 First (i) and 153 Second, adjustment boards are identified as the mandatory fora for resolution of "[t]he disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of

the interpretation or application of agreements. . . ."³ RLA Section 3 First (i), 45 U.S.C. § 153 First (i). Such claims are referable to the National Railroad Adjustment Board ("NRAB"), a permanent industry-wide adjustment board created under RLA Section 3 First, or to alternative adjustment boards established under RLA Section 3 Second. The adjustment board must render a final decision binding on all parties to the dispute, and that decision is subject to only limited judicial review. RLA Section 3 First (p) and (q), 45 U.S.C. § 153 First (p) and (q).

When Congress applied the RLA to the airline industry in 1936, it used similarly broad language to describe the scope of disputes to be resolved, the duties of the parties, and the methods for dispute resolution. *See* RLA Sections 201-205, 45 U.S.C. §§ 181-185. Adjustment Boards with jurisdiction and duties virtually identical to those of the NRAB are empowered to resolve "[t]he disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . ." RLA Section 204, 45 U.S.C. § 184. *Accord* RLA Section 205, 45 U.S.C. § 185.

³ RLA Section 4, 45 U.S.C. § 154 establishes the National Mediation Board ("NMB") as a mediating body in the rail and airline industries, and RLA Section 5 First and 203, 45 U.S.C. §§ 155 First and 183, grant the NMB jurisdiction to deal with "dispute[s] concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference [and] any other dispute not referable to [adjustment boards] and not adjusted in conference between the parties, or where conferences are refused." *Id.* Those kinds of disputes, termed "major" disputes, are not at issue in the *Norris* case. Instead, the question presented here is whether *Norris*' wrongful discharge claims present a dispute "growing out of grievances or out of the interpretation or application of agreements" falling within the scope of Section 204 of the RLA, 45 U.S.C. § 184.

b) Congress Expressly Committed "Whistleblower" Claims to RLA Jurisdiction.

One provision of the RLA, Section 204, makes it crystal clear that Congress intended for adjustment boards in the airline industry to resolve discharge and discipline claims even if those claims are based on non-contractual, public policy grounds: in Section 204, Congress explicitly included within the set of disputes covered by the RLA's dispute resolution procedures "cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board." 45 U.S.C. § 184. The National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), had been passed by Congress on July 5, 1935, and contained a specific provision – Section 8(4) – making it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA]." See 2 NLRB, Legislative History of the National Labor Relations Act of 1935, at 3270, 3273-74 (1935). Section 8(4) was recodified without change as Section 8(a)(4), 29 U.S.C. Section 158(a)(4), in 1947. See 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 6, 178, 237-239 (1948). NLRA Section 8(4) was an early example of a "whistleblower" protection statute,⁴ and Congress therefore determined by the passage of Section 204 of the RLA that the resolution of any pending claim by an NLRA whistleblower would be decided exclusively through RLA dispute resolution procedures.

A "whistleblower" statute contained in the Federal Rail Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 *et seq.*, also strongly supports the Petitioners' view that Congress intended

⁴ Section 8(3) of the NLRA also protected employees against retaliation and discrimination based on participation in other protected activities, such as union involvement. See 2 NLRB, Legislative History of the National Labor Relations Act of 1935, at 3270, 3273-74 (1935). The legislative history of RLA Section 204 contains specific examples of statutory discharge claims that were being transferred to the RLA's dispute resolution procedures. See *infra* p. 18.

for the RLA adjustment board procedures to be followed in resolving claims such as those raised by Norris. Section 212 of the FRSA contains a whistleblower protection provision which prevents a common carrier from "discharg[ing] or in any manner discriminat[ing] against any employee" for filing a complaint or instituting a proceeding related to enforcement of the FRSA. See 45 U.S.C. § 441. Congress explicitly committed the enforcement of Section 212 to the adjustment board procedures under the RLA. See 45 U.S.C. §§ 441(c), 153. The NRAB is given full authority to resolve those disputes and to impose appropriate remedies, including punitive damages.⁵

Significantly, Congress made it clear that in enacting the FRSA whistleblower provision, it was merely preserving the protections and remedies already available under the RLA. The Committee Report states that the intent was simply to codify the existing system:

The Committee understands that rail employees already receive similar protection, along with back-pay, through the grievance procedure. The Committee does not intend to alter the existing protection, but rather to put the prohibition of discrimination into statutory form. . . . Subsection (c)(1) provides that any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures in Section 3 of the Railway Labor Act. The Committee intends this to be the exclusive means for enforcing this section.

H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8 (1980). Thus, Congress clearly recognized that the existing adjustment

⁵ The record before the Hawaii Supreme Court, and before this Court, contains deposition testimony by an arbitrator with 25 years of experience arbitrating claims in the airline industry describing (1) the full *status quo ante* remedies that would have been available to Norris if he had prevailed before the system board of adjustment and (2) the possible availability of punitive damages and a cease and desist order (Jt. App. 305-319). See also *IAM v. Northwest Airlines*, 858 F.2d 427, 432 n.4 (8th Cir. 1988) ("penalty awards are generally enforceable under the Railway Labor Act").

board procedures under the RLA provide relief for claims of whistleblower discipline or discharge.⁶

In sum, the language of the RLA makes clear Congress' intent to extend RLA jurisdiction beyond disputes over the interpretation or application of bargaining agreements to reach non-contractual claims, including common law tort "wrongful discharge" claims based on "whistleblowing."⁷ The RLA stands alone among employment statutes in the breadth of its reliance on non-judicial dispute resolution procedures to resolve exactly the kind of "wrongful discharge" claims presented by Norris to the Hawaii court.⁸

⁶ See *United Transp. Union v. Springfield Terminal Co.*, 767 F. Supp. 333 (D. Me. 1991) (whistleblower provision codified existing dispute resolution mechanisms of the RLA). Furthermore, the FRSA's whistleblower provision has been held to preempt state wrongful discharge claims identical to those raised by Norris. See *Rayner v. Smirl*, 873 F.2d 60 (4th Cir.) (Section 441 and the "comprehensive remedial provisions" of the RLA incorporated therein are the railroad employee's exclusive remedy, and therefore state law claims for wrongful discharge are preempted), *cert. denied*, 493 U.S. 876 (1989). Although the *Rayner* court relied in part on the explicit preemption provision of the FRSA, see 45 U.S.C. § 434, the court's decision rested heavily on the fact that the state wrongful discharge statute was incompatible with the "detailed remedial scheme" of § 153 of the RLA. *Rayner v. Smirl*, 873 F.2d at 66.

⁷ In contrast, LMRA Section 301, the provision upon which *Lingle* preemption is based, is limited to claims "for violation of contracts." 29 U.S.C. § 185(a).

⁸ As this Court has recognized, the dispute resolution framework set forth in the RLA is "the product of a long legislative evolution" which "has no statutory parallel in other industry." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 754 (1961). For an overview of the unique early history of congressional involvement in rail labor disputes, see *id.* at 356 nn. 11-12 (discussing legislation from 1888 to 1920).

2. The Legislative History Underlying the RLA Likewise Demonstrates Congress' Intent For Claims of "Wrongful Discharge" to Be Resolved By RLA Procedures.

The legislative history of the RLA from the time of its inception confirms that Congress intended for RLA adjustment boards to resolve claims arising from rights or obligations outside the terms of a collective bargaining agreement. In the 1926 floor debates leading to the enactment of the RLA, Senator Watson described the types of matters committed to adjustment boards:

there are two classes of disputes that arise in connection with the operation of railroads. One class is what are ordinarily called grievances. They may be of a personal nature; they may involve a great many employees; they may involve a few employees; they may involve but one employee. Of this class, also, are disputes rising out of the interpretation and application of existing agreements as to wages, hours of labor, or working conditions.

67 Cong. Rec. 8807 (1926) (statement of Sen. Watson). Senator Watson's statement clearly signals Congress' understanding that the term "grievances" as used in Section 3 First (i) of the RLA, and later carried over to Section 204, was intended to apply broadly to non-contract based "personal" claims of employees.

Claims related to discipline were also identified in the legislative history of the RLA as intended to fall within adjustment board jurisdiction, even if those claims did not involve interpretation or application of bargaining agreements. Thus, in 1926 Representative Barkley described the function of the adjustment board as "not to consider questions of wages, but disagreements over grievances, interpretations, discipline and other technicalities that arise from time to time in the workshop and out on the tracks in the operation of the roads." 67 Cong. Rec. 4517 (1926). See also 67 Cong. Rec. 4670 (1926) (statement of Rep. Arentz) ("Minor disputes

involve discipline, grievances and disputes over the application and meaning of an agreement").⁹

In the 1926 House Debates, Representative Crosser similarly described the scope of inquiry to be conducted by RLA fora in most expansive terms: "These boards serve in a manner as courts to determine who is right and who is wrong, what is just and what is unjust, in disputes between railroads and their employees." 67 Cong. Rec. 4665 (1926).

The history of the RLA after its enactment in 1926 likewise makes clear that Congress intended for RLA adjustment boards to resolve non-contractual claims involving discipline and discharge. Following enactment of the RLA, the newly created NRAB did address claims relating to discipline and discharge. See Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 586 (1937). While there were many difficulties with the enforcement procedure of the 1926 Act – and those difficulties led to amendments in 1934 and later – the scope of claims regarding discipline and discharge committed to the adjustment board process was apparently unobjectionable because the scope of disputes covered by RLA Section 3 First (i) adjustment board procedures has remained unchanged for almost seventy years.

The RLA was amended in several important respects in 1934 in order to render its adjustment board procedures more effective.¹⁰ Those amendments continued to reflect Congress' clear and strong commitment to a broad RLA dispute resolution process. The participants in the debates that led to the 1934 amendments understood that adjustment board jurisdiction was quite broad, but they – and Congress – chose to leave

⁹ An early and respected authority on the Railway Labor Act similarly expressed his view that "questions of discipline or refusal to promote (constituting 'grievances') are reviewable by the board. . . ." Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 586 (1937).

¹⁰ This Court has addressed the 1934 amendments and their history at length in numerous decisions. See, e.g., *Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30 (1957); *Burley*, 325 U.S. 711 (1945).

that broad jurisdiction unchanged. This Court has concluded from comments by organized labor during the debates on the 1934 amendments that "[t]he employees were willing to give up their remedies outside of the statute" in order to achieve final binding adjustment of grievances through an adjustment board. *Union Pac. R.R. v. Price*, 360 U.S. 601, 613 (1959). Those unions supporting the amendments understood that their members were making an important but worthwhile concession:

These railway labor organizations have always opposed compulsory determination of their controversies. . . . [W]e are now ready to concede that we can risk having our grievances go to a board and get them determined and that it is a contribution that these organizations are willing to make.

Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2d Sess. 33, 35 (1934).

Those labor organizations that opposed the amendments similarly understood that the amendments would require "compulsory arbitration," and they claimed the enactment of the amendments would establish a dangerous precedent which would be unique in the history of the United States Congress. *Hearings before the House Committee on Interstate and Foreign Commerce on HR 7650*, 73rd Cong., 2d Sess. 118 (1934). Nevertheless, the amendments were passed, and no mention was made during the debates or hearings leading up to the amendments of any state law claims that would survive the 1934 amendments' enactment.

Another facet of the 1934 amendments demonstrating Congress' broad commitment to adjustment boards is the extraordinarily limited judicial review of adjustment board proceedings provided by the amendments. The scope of review provided in Section 3 First (p) and (q), 45 U.S.C. § 153 First (p) and (q), is "among the narrowest known to the law." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978) (citations omitted). "Not only has the Congress thus designated an agency peculiarly competent to handle" workplace

disputes, "it also intended to leave a minimum of responsibility to the courts." *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566 (1946).

The legislative history underlying the 1936 amendments to the RLA extending the RLA's dispute resolution procedures to air carriers also demonstrates that non-contract based, public policy discharge cases were specifically included among the types of cases Congress was told would be transferred from the NLRA setting to the RLA dispute resolution procedures. For example, Captain E.G. Hamilton of the Air Line Pilots Association identified a wrongful discharge case by pilots who had been terminated for attempting to bargain collectively and a case alleging discrimination against a pilot as examples of cases that would be decided by RLA procedures. *To Amend the Railway Labor Act to Cover Every Common Carrier by Air Engaged in Interstate Commerce, Hearings on S. 2496 Before a Subcommittee of the Committee on Interstate Commerce*, 74th Cong., 1st Sess. 5 (1935). Similar views were expressed by a representative of the International Association of Machinists which represented many airline mechanics: "numerous complaints for the men of discrimination, [were] brought . . . before the regional labor boards, which are subsidiary to the National Labor Relations Board, and in some cases we got them adjusted and in others we did not." *Id.* at 20 (statement of D. Kaplan, Research Director, International Association of Machinists).

Finally, Congress' decision in 1936 to require adjustment boards to begin resolving employment disputes in the airline industry *before* collective bargaining agreements had been reached strongly supports Petitioners' contention that Congress intended for the RLA to reach beyond contract disputes. Thus, the 1936 amendments provided for creation of system boards of adjustment "to settle individual disputes" even though Congress recognized that "there are no such [airline collective bargaining agreements] in operation now." H.R. Rep. No. 2243, 74th Cong., 2d Sess. 1 (1936). Given the foregoing legislative history, it is clear that Congress intended for adjustment boards to have mandatory jurisdiction to

resolve wrongful discharge claims even if those claims arose outside the terms of a collective bargaining agreement.

3. Allowing Norris to Bypass the RLA Dispute Resolution Process and Challenge His Discipline in State Court Would Frustrate the RLA Scheme.

"The purpose of the Railway Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees. . . ." *Union Pac. R.R. v. Price*, 360 U.S. 601, 609 (1959). As this Court has recognized, the RLA is "a product of many years of thought, study, conferences, discussions and experiments." *Pennsylvania R.R. v. Day* ("Day"), 360 U.S. 548, 555 (1959). Based on that long experience, Congress concluded that industrial peace in the vital transportation industry would be fostered by a dispute resolution system built on the principles of uniform application of rules and cooperative and autonomous decision making by individuals knowledgeable in the complexities of the rail and airline industries. Permitting state claims for wrongful discharge would clearly frustrate the goals which Congress sought to achieve through the RLA's enactment.

Congress recognized during consideration of the 1934 amendments that uniformity in dispute resolution was important in part because consistent application of rules relating to grievances would lessen the frequency of disputes and unrest. *See Hearings before the Senate Committee on Interstate Commerce on S. 3266*, 73rd Cong., 2d Sess. 17 (April 10, 1934) (statement of Commissioner Eastman, principal draftsman of the 1934 amendments) ("if some greater degree of uniformity can be attained by national consideration, the tendency will gradually be to reduce the number of debatable disputes. Precedents will mean something, whereas they now often mean little or nothing"). In addition, disparity of treatment among similarly situated workers was a leading cause of unhappiness among employees. *Day*, 360 U.S. at 553; *see also International Ass'n of Machinists v. Central Airlines, Inc.* ("Central Airlines"), 372 U.S. 682, 691-92 (1963) (RLA

cannot be construed to permit inconsistent decisions by state tribunals: "The needs of the subject matter manifestly call for uniformity").¹¹

As this Court has recognized, the RLA's goal of uniformity would be undermined if state courts were permitted to encroach on the adjustment board's authority:

We can take judicial notice of the fact that provisions in railroad collective bargaining agreements are of a specialized, technical nature calling for specialized technical knowledge in ascertaining their meaning and application. Wholly apart from the adaptability of judges and juries to make such determinations, varying jury verdicts would imbed into such judgments varying constructions not subject to review to secure uniformity. Not only would this engender diversity of proceedings but diversity through judicial construction and through the construction of the adjustment board. Since nothing is a greater spur to conflicts, and eventually conflicts resulting in strikes, than different pay for the same work or unfair differentials, not to respect the centralized determination of these questions through

¹¹ Congress has recognized that there is a more compelling need for uniformity of treatment for transportation industry employees than exists in other industries: "Railroads and airlines are direct instrumentalities of interstate commerce . . . the duties of many employees require the constant crossing of State lines; many seniority districts under labor agreements. . . extend across State lines, and . . . employees are frequently required to move from one State to another." H.R. Rep. 2811, 81st Cong., 2d Sess. 5 (1950) (amendments adding union security agreements to RLA and rejecting language whereby an employee could "opt out" of unionization under state right to work laws). See also 96 Cong. Rec. 16,261 (1950) (statement of Sen. Hill) ("When we pick up a telephone in Washington to make a call to Florida it does not involve any personnel moving out of the District of Columbia and going to Florida or to any other State. . . . However, when a railroad train moves out of Washington on the way to Florida, personnel does cross State lines.").

the Adjustment Board would hamper, if not defeat, the central purpose of Railway Labor Act.

Day, 360 U.S. at 553. This Court has similarly recognized that when the RLA was extended to air carriers in 1936 Congress "could not . . . have thought that stability and continuity to interstate air commerce would come from the undulating policies . . . of the legislatures and courts (or both) of the [50] states." *Central Airlines*, 372 U.S. at 691 n.15 (citations omitted).

Forum shopping is antithetical to the goal of promoting uniformity in dispute resolution in the transportation industry. If claims such as Norris' were permitted to go forward in the multitude of available state courts, a climate of discord and dispute could be expected as employees or carriers disappointed with a given ruling by an adjustment board ignored that ruling and went to another tribunal looking for a more favorable result.¹² As a crazy-quilt of state decisions fell into place, workers throughout the industry would undoubtedly feel the stab of disparate treatment, the very result Congress sought to avoid by mandating adjustment board resolution of claims.

¹² It is important to recognize that the Hawaii court's decision would probably do more than simply provide an employee with an election of fora for wrongful discharge or other non-contractual grievances. It could lead employees to commence RLA procedures and then resort to state actions if disappointed with the RLA's result. See *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993). It could also encourage an employee who has prevailed before the RLA to pursue an action in state court to recover damages not available through RLA procedures. E.g., *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250 (5th Cir. 1986) (discharged employee recovered back pay through RLA grievance procedures then filed state court suit to recover for emotional distress as a result of his firing), *cert. denied*, 488 U.S. 925 (1988). Finally, a litigant frustrated with the law in, or result obtained from, one state tribunal might file a new action in another state with sufficient contacts to the employment relationship where substantive laws were more hospitable to his claim and also distinct enough to avoid the preclusive effect of an adverse judgment in the first state forum.

Another means by which Congress intended to foster harmony within the transportation industry was through the significant industry autonomy placed in the RLA's dispute resolution procedures. In a departure from its prior legislation in the area,¹³ Congress took the approach that reposing decisionmaking authority with those likely to be affected by the decisions would foster peace within the industry and promote conciliation of disputes:

The provisions of this measure will add to the efficiency of the transportation system by affording a sane and practical method for the settlement of disputes between the operators and the employees. By providing in this manner for a better understanding between those concerned and for an effective settlement of points of dispute increased efficiency will follow in the transportation service.

67 Cong. Rec. 4666 (1926) (statement of Rep. N. C. Laughlin). It was similarly observed in the House of Representatives that "the more responsibility and power you throw at the employer and the employees the more likely you are to get peace. . . ." 67 Cong. Rec. 4650 (1926) (statement of Rep. Jacobstein).

Congress also viewed autonomy as an important objective because of the particular competence of adjustment boards to decide disputes within the affected industries. It has been observed that the rail industry is "a state within a state" with its own laws and particular customs. Congress concluded that "disputes should be settled by practical men of affairs in close contact with the situation and with an understanding of

¹³ Prior to enactment of the RLA, the Transportation Act of 1920 provided for mandatory resolution of rail industry disputes by a federally-created Rail Labor Board. As this Court has recognized: "The experiment was unsuccessful." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 756 (1961). "Congress has since that time consistently adhered to a regulatory policy which places the responsibility squarely upon the carriers and the unions mutually to work out settlements of all aspects of the labor relationship." *Id.* at 757.

the psychology of the parties." 67 Cong. Rec. 4650 (1926) (statement of Rep. Jacobstein).

Allowing Norris to bring his wrongful discharge claims in state court would undermine the goal of uniform, autonomous, knowledgeable, expeditious, and final decisionmaking embodied in the RLA. The facts surrounding Norris' censure raise myriad issues calling for knowledge of, expertise in, and sensitivity to airline industry concerns.¹⁴ Affirmance of the Hawaii court's decision would therefore undermine Congress' goals in enacting the RLA and prevent dispute resolution by the decisionmaker – the system board of adjustment – that Congress chose to resolve discharge and discipline disputes.¹⁵

B. THE SUPREME COURT'S INTERPRETATION OF THE RLA SCHEME SUPPORTS PREEMPTION OF STATE "WRONGFUL DISCHARGE" CLAIMS.

1. This Court Has Recognized That Adjustment Board Jurisdiction Extends to Disputes That Arise Outside the Terms of a Collective Bargaining Agreement.

In *Elgin, J. & E. Ry. Co. v. Burley* ("Burley"), 325 U.S. 711 (1945), this Court conducted an extensive review of the language and legislative history of the RLA and found that

¹⁴ For example, one issue demanding adjustment board input is determining whether the actions taken against Norris after he refused to sign the work record amounted to a "discharge." *See infra* pp. 34-35.

¹⁵ Since the Hawaii court held Norris' wrongful discharge claim was not a "minor" dispute, the court's holding could result in removing similar claims from adjustment board jurisdiction even for those employees desiring to resolve their wrongful discharge disputes in that forum. The Hawaii court's decision may also preclude workers covered by Norris' CBA from claiming that the express provisions of Art. XVII.F of the CBA protect them from being discharged for refusing to perform work in violation of federal or state safety laws other than workplace safety laws (*See* Pet. App. 60a).

the statutory provisions for adjustment of disputes encompassed disputes over rights and interests existing independent of a collective bargaining agreement. The *Burley* Court recognized that Congress intended for RLA adjustment board jurisdiction to extend not only to contract interpretation or application issues but also to the so-called "omitted case" where "the claim is founded upon some incident of the employment relationship, or asserted one, independent of those covered by the collective bargaining agreement, e.g., claims on account of personal injuries." 325 U.S. at 723. As shown below, that conclusion was essential to the Court's holding in *Burley* and has not been overturned by later decisions.

Burley addressed the question of whether and to what extent an aggrieved employee had a right to participate in the prosecution and settlement of disputes before an adjustment board under Section 3 of the RLA. The carrier there had settled a number of individual employee grievances by agreement with the employees' bargaining representative but had not obtained the consent of involved employees to some of the settlements. The carrier argued that the bargaining representative had the power to settle the grievances on the employees' behalf. 325 U.S. at 733. The Court rejected that view:

We think that such a view of the statute's effects, insofar as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, would be contrary to the clear import of its provisions and to its policy.

325 U.S. at 733.¹⁶

¹⁶ The RLA as interpreted in *Burley* is thus clearly distinguishable from the LMRA, under which an employee has no independent right to go to arbitration. *Republic Steel Corp. v. Maddox* ("Maddox"), 379 U.S. 650, 653 (1965) (for arbitration of contract grievances under LMRA § 301, "unless the contract provides otherwise there can be no doubt that the employee must afford the union the opportunity to act on his behalf"). Under the LMRA the employee's recourse if the union refuses to process his grievance is to sue the union for breaching its duty of fair representa-

The Court held that "[a]cceptance of this view would require the clearest expression of purpose" since exclusive union representation would work a severe hardship on aggrieved employees. *Id.* The construction urged by the carrier was viewed as severe precisely because of the extensive reach of RLA jurisdiction:

It would be difficult to believe that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them *and to all other incidents of that relation*. . . . [T]his would mean that Congress had nullified *all preexisting rights of workers to act in relation to their employment*. . . .

325 U.S. at 733-34 (emphasis added).

The Court also recognized that exclusive union representation would not in all instances guarantee adequate prosecution of claims on behalf of the individual employee. The union was likely to be less than zealous in prosecuting disputes "where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all. . . ." 325 U.S. at 734.¹⁷

That the statute does not purport to discriminate between these and other cases furnishes strong support for believing its purpose was not to vest final

tion. See *Vaca v. Sipes*, 386 U.S. 171 (1967). The RLA grievant, by contrast, is free to pursue his or her own grievance as an individual through the adjustment board.

¹⁷ Cf. *Maddox*, 379 U.S. at 653: "Union interest in prosecuting employee grievances [in the LMRA setting] is clear." The different approaches under the RLA and LMRA are attributable in large part to the fact that RLA jurisdiction extends beyond contract disputes, while LMRA jurisdiction does not.

and exclusive power of settlement in the collective agent.

325 U.S. at 734.

Even though the claims of the aggrieved employees in *Burley* involved the collective bargaining agreement, the Court's finding that non-contractual claims fell within the adjustment board jurisdiction was clearly an integral part of the *Burley* decision. While the question presented in the instant case is different, the *Burley* Court's careful and deliberate finding should be deemed controlling on the question of the reach of RLA jurisdiction.

The Hawaii Supreme Court in the decision below found implicitly that the so-called "omitted case" finding of *Burley* was overruled by this Court's recent decision in *Consolidated Rail v. Labor Executives' Ass'n* ("*Conrail*"), 491 U.S. 299 (1989):

The Court stated that "minor" disputes, to which § 153 First (i) applies, are those that "may be conclusively resolved by interpreting the existing [collective bargaining] agreement." 491 U.S. at 305 (citations omitted). The Court also stated that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 307. *The Supreme Court's interpretation of the RLA's mandatory arbitration provision demonstrates its belief that Congress intended to affect only those disputes involving contractually defined rights.*

(Pet. App. 14a) (emphasis added).

Petitioners respectfully submit that the Hawaii court's conclusion that *Conrail* somehow overruled *Burley*'s "omitted case" holding is erroneous. The question presented in *Conrail* – whether a carrier's asserted right to conduct drug testing of employees should be resolved through NMB mediation procedures under RLA Section 5 or adjustment board arbitration under RLA Section 3 First (i) – had nothing whatsoever to do

with determining which disputes fell outside RLA dispute resolution procedures. The *Conrail* Court described the "major/minor terminology" as "a shorthand method of describing two classes of controversy Congress had distinguished in the RLA." 491 U.S. at 302. Nowhere does the *Conrail* Court describe its discussion of the major and minor categories as exhaustive of RLA jurisdiction. There was no reason for the *Conrail* Court to reach *Burley*, since the earlier holding was not determinative of the issues before it. Therefore, there is no reason to believe the *Conrail* Court intended to disturb the earlier finding in *Burley* that the RLA dispute resolution procedures extend to non-contractual claims. In fact, there is much in the Court's decision in *Conrail* suggesting that the "omitted case" remains an accepted category of RLA jurisdiction to be committed to adjustment board procedures, as *Conrail* quotes *Burley*'s "omitted case" discussion, 491 U.S. at 303,¹⁸ with apparent approval.

2. *Andrews* Declares That the RLA Adjustment Board Is the Exclusive Forum for "Wrongful Discharge" Claims.

Andrews v. Louisville & Nashville R.R. ("*Andrews*"), 406 U.S. 320 (1972), holds that an employee may not avail himself of a state law forum and remedy to challenge an alleged wrongful termination. *Andrews* finally and definitively overruled a line of cases which had held that a terminated employee could elect to assert a claim of wrongful discharge in state court: *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941); *Transcontinental & W. Air, Inc. v. Koppal*, 345 U.S. 653 (1953). The reach of *Moore* and *Koppal* had been eroded over the years, as decision after decision construing the RLA endeavored to distinguish or limit their holdings. See, e.g., *Burley*, 325 U.S. at 720-21. In *Andrews* the Court finally plainly acknowledged that "the notion that the grievance and

¹⁸ The Hawaii court quotes from *Conrail*'s quotation of *Burley*, but significantly the Hawaii court's quotation omits the portion of the *Conrail* quote describing the "omitted case" rule (Pet. App. 12a).

arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." 406 U.S. at 322.

In rejecting the reasoning of *Moore* and *Koppal* that RLA dispute resolution procedures were merely voluntary, the *Andrews* court observed,

Later cases from this Court have repudiated the reasoning advanced. . . . Fifteen years ago, in *Brotherhood of Railroad Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 39 (1957), this Court canvassed the relevant legislative history and said:

"This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."

406 U.S. at 322. The Court also cited its observation in *Walker v. Southern R.R.*, 385 U.S. 196, 198 (1966): "'Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes. . . .'" 406 U.S. at 322 (quoting *Walker*).

Andrews goes quite far toward resolving the issues before the Court on the instant petition. In *Andrews* the employee similarly claimed his discharge was "wrongful" and in violation of state law. The employee had pled his claim as a breach of contract under state law and had refused to go through the adjustment board procedures. In holding the claim preempted in spite of its characterization as a breach of state law, the Court made clear that a discharged employee cannot avoid the strictures of the RLA through artful pleading. Under similar facts in *Moore*, the employee was held entitled to pursue a state law claim because he "chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee. . . ." *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239 (1950). *Andrews* flatly rejected that approach: "The fact that petitioner characterizes his claim as one for 'wrongful

discharge' does not save it from the Act's mandatory provisions for processing of grievances." 406 U.S. at 323-24.

Andrews also stands for the proposition that RLA preemption applies even if the relief available from the adjustment board does not match state law actions or remedies. Justice Douglas, dissenting in *Andrews*, discussed the remedies available to the discharged employee under Georgia law and cited the rationale of *Moore* and its progeny: "'A common law or statutory cause of action for wrongful discharge differs from any remedy which the Board has the power to provide.'" 406 U.S. at 329 (Douglas, J., dissenting) (quoting *Slocum*, 339 U.S. at 244) (emphasis in dissenting opinion). Justice Douglas argued that referring the employee's claims to the RLA "is to remit him to an agency that has no power to act on this claim." *Andrews*, 406 U.S. at 328. The dissent also complained that "an employee seeking damages for reinstatement is normally entitled to a jury trial; and no division of the Adjustment Board ever pretends to serve in that role." *Id.* at 329.¹⁹

The *Andrews* majority did not respond point by point to the dissenting Justice's argument, but it was forthright in acknowledging that RLA preemption could preclude resort to remedies otherwise available in a state court:

The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee

¹⁹ Justice Douglas also observed: "[T]he body of law governing the discharge of employees who do not want or seek reinstatement is not found in customs of the shop or in the collective agreement but in the law of the place where the employee works. The Adjustment Board is not competent to apply that law." 406 U.S. at 329.

The objections raised by Justice Douglas in *Andrews* were similar to those raised in dissent by Justice Reed in *Slocum*, 339 U.S. at 245, a case holding that employees could not resort to state court to enforce the terms of their collective bargaining agreements. Justice Reed complained that "the Court says that Congress has forced the parties into a forum that has few of the attributes of a court, but which may be the final judge of the rights of individuals." 339 U.S. at 252-53.

and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another.

406 U.S. at 325.

In sum, *Andrews* holds that the RLA dispute mechanism procedures are mandatory and exclusive for all disputes within the RLA's scope, even if that means that state law rights and remedies will be lost. From the statutory language and legislative history of the RLA, it is clear that RLA jurisdiction extends to disputes involving non-contractual challenges to discipline and discharge. *Burley* confirms that RLA jurisdiction extends to disputes over discipline and discharge "where the grievance arises from incidents of the employment not covered by a collective agreement," and that "the statute does not purport to distinguish" between such "omitted cases" and those claims involving specific contract provisions. *Burley*, 325 U.S. at 736. In view of the clear reach of the RLA to non-contractual discipline and discharge disputes, the holding in *Andrews*, when read with the holding in *Burley*, means that all state law wrongful discharge claims are preempted whether they are pled as breaches of state contract laws or violations of state tort laws.²⁰

²⁰ Of course, the preempted claim in *Andrews* was founded upon a breach of a collective bargaining agreement. See *Andrews*, 406 U.S. at 324 ("the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective bargaining agreement. . . ."). However, the decision does not purport to limit the scope of RLA preemption to contract-based claims. Indeed, the employee in *Andrews* could have easily pled his "wrongful discharge" claim as a tort or statutory disability discrimination claim because "the company refused to allow him to go to work on the ground he had not recovered sufficiently [from an injury] to perform his former duties." 406 U.S. at 327 (Douglas, J., dissenting). See generally, *Melanson v. United Air Lines, Inc.*, 931 F.2d 558, 561 n.1 (9th Cir. 1991) ("Nearly any

II. THE RLA PREEMPTS NORRIS' "WRONGFUL DISCHARGE" CLAIMS

Norris' "wrongful discharge" tort claims in Count I against Hawaiian and Counts I and II against the Individual Defendants are preempted by the RLA because those claims "grow[] out of grievances, or out of the interpretation or application of [an] agreement concerning rates of pay, rules, or working conditions. . . ." RLA Section 204, 45 U.S.C. § 184. In Count I of each complaint Norris states a common law tort claim that he was wrongfully discharged in violation of public policies embodied in the Federal Aviation laws because he refused to sign off on a work report due to his concerns about the airworthiness of an axle sleeve he observed during a tire change on a DC-9 aircraft (Jt. App. 7).²¹ Similarly, in Count II of his complaint against the Individual Defendants, Norris states a common law tort claim that he was wrongfully discharged in violation of public policies within the state whistleblower act because he reported an unsafe axle sleeve to the Federal Aviation Authority (Jt. App. 17).

Norris' common law claims are exactly the kinds of disputes Congress directed both employees and carriers, as well as carriers' officers, to resolve through the dispute resolution procedures of the RLA. See RLA Section 2 First, 45

contract claim can be restated as a tort claim. The RLA's grievance procedure would become obsolete if it could be circumscribed by artful pleadings").

²¹ It should be noted that Congress itself has never expressly included a "whistleblower" protection provision in the Federal Aviation Act despite bills being introduced to enact such legislation. See S. 48, 101st Cong., 1st Sess. (1989); H.R. 4023, 100th Cong., 2d Sess. (1988); H.R. 4113, 100th Cong., 2d Sess. (1988); H.R. 5073, 100th Cong., 2d Sess. (1988). While the reasons the legislation has failed cannot be determined, it is certainly possible that Congress was aware that employees in the airline industry are already protected from termination for whistleblowing under the mandatory arbitration procedures of Section 204 of the RLA. See discussion of FRSA *supra* pp. 12-14.

U.S.C. § 152 First ("carriers, their officers, agents, and employees" have a duty "to settle all disputes, whether arising out of the application of [collective bargaining] agreements or otherwise. . . ."). Those claims are covered by the explicit description of the jurisdiction of the System Board of Adjustment in RLA Section 204, 45 U.S.C. § 184. Furthermore, such whistleblower or public policy claims have long been recognized by Congress to be amenable to resolution through adjustment board procedures. See discussion of NLRA and FRSA *supra* pp. 12-14. The legislative history of the RLA likewise demonstrates, as this Court held in *Andrews*, that the adjustment board forum is mandatory for wrongful discharge claims within the RLA's jurisdiction. Finally, *Burley* makes it plain that employee claims based on substantive law external to a collective bargaining agreement are within adjustment board jurisdiction, at least where the particular claim has been identified by Congress – as discipline and discharge claims repeatedly were – as a dispute to be resolved through the RLA. Norris' claims therefore fall squarely within the RLA dispute resolution scheme and must be preempted.

To the extent that any ambiguity might exist as to whether Norris' claims are committed exclusively to adjustment board jurisdiction, that ambiguity has been removed by the terms of the CBA covering Norris' employment. Under Article XVI of that agreement, a System Board of Adjustment is established "[i]n compliance with Section 204, Title II, of the Railway Labor Act" (Pet. App. 54a) and is given, in Article XVI.C, "exclusive jurisdiction over disputes between any employee covered by this Agreement and the Company . . . growing out of grievances concerning disciplinary action, rules, rates of pay, or working conditions covered by this Agreement . . . or out of the interpretation or application of any terms of this Agreement. . . ." (Pet. App. 55a). Since the foregoing contractual language tracks the adjustment board jurisdictional language of RLA Section 204, it is clear that Norris' non-contract-based wrongful discharge claims are within the adjustment board's jurisdiction. See discussion *supra* Part I. Indeed, by including grievances "concerning disciplinary action" within the "exclusive jurisdiction" of the

adjustment board, Article XVI.C is, if anything, clearer than RLA Section 204 in encompassing Norris' claims.

Furthermore, the CBA requires the adjustment board to evaluate whether the discipline of an employee in Norris' situation would violate public policies embodied in the Federal Aviation laws. Article XVII.F of the CBA provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal safety law shall not warrant disciplinary action" (Pet. App. 60a-61a).²² The CBA therefore makes explicit in Articles XVI.C and XVII.F what we have previously shown Congress understood to be encompassed by the mandatory jurisdiction of adjustment boards – namely, resolution of disciplinary "grievances," including whistleblower claims such as Norris', even when those claims are non-contract based.

Mandatory adjustment board jurisdiction is independently established by the fact that Norris' claims "grow out of . . . the interpretation or application of . . . terms of [the CBA]" (CBA Article XVI.C, Pet. App. 55a). See also RLA

²² While the Hawaii court conducted its own analysis of Article XVII.F and found that that provision did not protect a mechanic who refused to sign off on work records or who refused to perform work out of safety concerns regarding the airworthiness of an aircraft (Pet. App. 19a-20a), a System Board with knowledge of the industry practices and working conditions might well disagree with the court's narrow construction, thereby affording additional substantive protections to covered employees and, by extension, to the flying public. Indeed, an arbitrator with 32 years of experience interpreting collective bargaining agreements in many industries, including 25 years in the airline industry (see *Jt. App.* 317, 325-26), reviewed the protection given to employees by Article XVII.F and testified without contradiction that "this agreement, in an unusual fashion, does cover the so-called whistleblower incident . . . exception to insubordination, very specifically in the contract." (*Jt. App.* 316 (Testimony of Ted Tsukiyama, Esq.); see also *Jt. App.* 307-08, 313 ("this contract is unusual in that it does have provisions which, I think, protect an employee in Mr. Norris' position with regard to refusing to sign off or complaining about what he believes to be unsafe work . . . or unsafe practices."), and *Jt. App.* 314-18).

Section 204, 45 U.S.C. § 184. When the dispute arose between Norris and his supervisor about his refusal to sign the work record for the tire change, the two disagreed about whether the signature on the work record meant that Norris was signing for the condition of the axle sleeve. Since the CBA provides that "[a]n airline mechanic may be required to sign work records in connection with the work he performs," Norris' discipline for refusing to sign the work record clearly "grew out of" an application of the CBA. (CBA, Article IV.D.4(a), Pet. App. 48a). See discussion *infra* pp. 44-45.

Finally, an essential element of Norris' claims is a "discharge," and proving that will require interpretation *and* application of the CBA *and* of the grievance process itself. In Norris' case, the hearing officer at the step 1 level recommended Norris' termination, but while the grievance was pending at the step 3 level, the step 3 hearing officer reduced the discipline to a suspension. Norris never returned to work or attempted to have his suspension overturned. Instead, several months after his reinstatement, he filed suit in state court claiming he had been discharged.

The nature and classification of the disciplinary action taken against Norris is a matter within the expertise of the adjustment board, and it is a matter requiring uniformity of treatment throughout the airline and railroad industries. Certainly that is one reason why Congress committed resolution of such disputes to the RLA arbitral process. *Cf. Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1253 (5th Cir. 1986) (worker who won reinstatement through the RLA grievance proceeding cannot subsequently sue for "wrongful discharge" under state law), *cert. denied*, 488 U.S. 925 (1988).²³

²³ Despite this fundamental purpose of the RLA, the Hawaii Supreme Court completely ignored Hawaiian Airlines' argument that the RLA precluded a state court from deciding the nature of Norris' discipline since that determination is part and parcel of the grievance process. If allowed to stand, the court's decision will require a state court jury to interpret the CBA and its application and the CBA's grievance procedure to determine if

The mandatory jurisdiction of the System Board over Norris' claims under the agreement here is also supported by this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26 (1991). *Gilmer* held that the terms of an arbitration agreement covered by the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq.*, could require arbitration of a discriminatory discharge claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621 *et seq.*, where the arbitration agreement was covered by the FAA and the language of the agreement was broad enough to encompass the ADEA claim. 500 U.S. at ___, 114 L. Ed. 2d at 35. The issue before the Court here – namely, the scope of RLA preemption of state law wrongful discharge claims – is different than the issue in *Gilmer*, which addressed whether arbitration can be a mandatory forum for federal discrimination claims. However, the holding in *Gilmer* that an arbitration agreement that is sanctioned by federal law, and sufficiently broad in its description of arbitral jurisdiction, can form the basis for mandatory arbitration of a non-contract-based discharge claim supports our view that the RLA-sanctioned CBA here by the broad jurisdiction terms of Article XVI.C properly granted "exclusive jurisdiction" to the adjustment board to consider Norris' state-law wrongful discharge claims.

Finally, preemption of Norris' claims by the RLA is supported by the fact that the subject matter of the claims – discipline related to safety matters and even whistleblowing – are frequently resolved by arbitration. *See, e.g., Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F.2d 139 (2d Cir. 1986) (discharge of flight attendant who complained of violation of flight and duty time rules presents a minor dispute for the RLA); *Missouri-Kansas*

Norris was discharged; for Norris cannot prevail in his wrongful discharge claims if he was merely suspended.

Texas R. v. Brotherhood of R.R. Trainmen, 342 F.2d 298, 300 (5th Cir. 1965) (prior to enactment of FRSA rail employees were required to submit whistleblower grievances to National Railway Adjustment Board for adjustment).²⁴

III. THE CASES RELIED ON BY NORRIS, THE HAWAII SUPREME COURT AND THE SOLICITOR GENERAL TO NARROW THE SCOPE OF RLA PREEMPTION DO NOT DETERMINE THE SCOPE OF ADJUSTMENT BOARD JURISDICTION

Instead of applying the directive of this Court's rulings in the *Andrews* and *Burley* decisions, Norris, the Hawaii Supreme Court and the Solicitor General of the United States urge that four other decisions by this Court – *Lingle*, *Conrail*, *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) – require the result reached by the Hawaii Supreme Court. As set forth below, the cases relied upon are clearly distinguishable both legally and factually from the *Norris* case. To apply them to the RLA preemption issue here would be wholly inconsistent with the language, history, and purposes of the RLA. None of those cases provide a basis for departing from Congress' clear intent that disputes involving discipline and discharge – even those involving matters outside of a collective bargaining

²⁴ Numerous reported decisions of the NRAB similarly address wrongful discharge and whistleblower issues. NRAB Third Division Award No. 23151 (Jan. 30, 1981) at 1, 7 (addressing grievance that employee had been dismissed in retaliation for "disloyalty" to the railroad); NRAB Third Division Award No. 27505 (Sept. 22, 1988) (addressing claim of "constructive discharge" arising from employee's refusal to follow criminal directives); NRAB First Division Award No. 24059 (Feb. 6, 1991) at 1-2 (employee allegedly discharged for complaining of safety procedures); NRAB Second Division Award No. 12148 (Sept. 25, 1991) at 2 (claimed discharge of employee for public statements regarding safety matters); Public Law Board No. 3399, Award No. 4 (Mar. 11, 1985) at 6 (awarding damages for termination held retaliatory).

agreement and specifically those involving whistleblower claims – should be conclusively resolved by adjustment boards.

A. THE HAWAII COURT'S RELIANCE ON *LINGLE* IS MISPLACED

1. Lower Courts Broadly Applied *Andrews* to Tort-Based Claims for "Wrongful Discharge" Until This Court's Decision in *Lingle*.

As discussed above, this Court held in *Andrews* that the RLA preempts an employee's state law wrongful discharge claim. Prior to the *Lingle* decision, courts broadly applied *Andrews* to hold that the RLA preempts claims for wrongful discharge that sound in tort as well as contract. In fact, with one exception, every pre-*Lingle* court considering the preemptive effect of the RLA over state law wrongful discharge claims ruled in favor of preemption. See *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1252 (5th Cir. 1986), *cert. denied*, 488 U.S. 925 (1988); *Minehart v. Louisville & N. R.R.*, 731 F.2d 342, 345 (6th Cir. 1984); *Graf v. Elgin, J. & E. Ry.*, 790 F.2d 1341, 1348 (7th Cir. 1986); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1048-51 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1169 (4th Cir. 1985); *Campbell v. Pan American World Airways, Inc.*, 668 F. Supp 139, 145 (E.D.N.Y. 1987) (broader preemption under RLA than under NLRA); *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102, 106 (2nd Cir. 1987) ("stronger application of the preemption doctrine is a corollary to the RLA's unique dispute-resolution framework"); *Hodges v. Atchison, T. & S.F. Ry.*, 728 F.2d 414, 417 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984). But see *Puchert v. Agsalud*, 67 Haw. 25, 29, 677 P.2d 449, 456 (1984), *appeal dismissed for want of substantial federal question*, 472 U.S. 1001 (1985).

Pre-*Lingle* courts also uniformly found other kinds of torts arising out of or related to wrongful discharge claims to be preempted. *McCall v. Chesapeake & O. Ry.*, 844 F.2d 294,

303 (6th Cir.) (RLA preempts discrimination claim by diabetic who was terminated), *cert. denied*, 488 U.S. 879 (1988); *Magnuson v. Burlington N. Inc.*, 576 F.2d 1367, 1369 (9th Cir.) (RLA preempts claim of emotional distress following alleged wrongful discharge), *cert. denied*, 439 U.S. 930 (1978); *Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 429 (9th Cir. 1983) (RLA preempts claim of intentional infliction of emotional distress resulting from harassment relating to work conditions and disciplinary procedures); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 192 (9th Cir. 1983) (RLA preempts wrongful demotion claim).

The foregoing pattern of holdings was disrupted in the wake of this Court's ruling in *Lingle v. Norge Div. of Magic Chef, Inc.* ("Lingle"), 486 U.S. 399 (1988), in which this Court fashioned a standard to address preemption under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. In the years following the *Lingle* decision, a minority of lower courts has applied the *Lingle* preemption standard to RLA cases.²⁵

In the majority of cases, however, courts have recognized that critical differences between the LMRA and the RLA make the *Lingle* standard inapplicable in the RLA context. See *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990); *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1097 (9th Cir. 1991) (cases under the LMRA not controlling because preemption under RLA is broader than under § 301); *Lorenz v. CSX Trans., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (*Lingle* inapplicable because RLA preemption is more pervasive);

²⁵ *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993); *Davies v. American Airlines, Inc.*, 971 F.2d 463, 466-67 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993); *International Ass'n of Machinists & Aerospace Workers v. Allegis Corp.*, 545 N.Y.S.2d 638 (N.Y. Sup. Ct. 1989); *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 593 A.2d 750, 758 (1991); *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1 (1st Cir. 1992) (applying *Lingle* but finding preemption), *cert. denied*, 122 L. Ed. 2d 134 (1993).

Smolarek v. Chrysler Corp., 879 F.2d 1326, 1334 n.4 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989); *Brown v. Missouri Pac. R.R.*, 720 S.W.2d 357, 359 n.5 (Mo.), *cert. denied*, 481 U.S. 1049 (1986) (NLRA is much less impacting than RLA); *Feldleit v. Long Is. R.R.*, 723 F. Supp. 892, 899 (E.D.N.Y. 1989) ("[t]here is broader preemption under the RLA than under other federal labor laws"); *Underwood v. Venango River Corp.*, 995 F.2d 677, 682 (7th Cir. 1993) (*Lingle* and *Andrews* support the position that RLA preemption is broader than preemption under the LMRA); *Croston v. Burlington N.R.R.*, 999 F.2d 381 (9th Cir. 1993).

Indeed, many post-*Lingle* decisions recognize the broad preemptive power of the RLA without even referring to *Lingle*. See, *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 845 (9th Cir. 1989) (post-*Lingle* decision holding wrongful discharge claims preempted by RLA); *Zimmerman v. Atchison, T. & S.F. Ry.*, 888 F.2d 660, 662 (10th Cir. 1989); *Calvert v. Trans World Airlines, Inc.*, 959 F.2d 698, 700 (8th Cir. 1992). In *Norris*, the Hawaii court joined the minority of courts and applied the less-preemptive *Lingle* standard to RLA preemption. As explained below, the *Lingle* standard is inapplicable to preemption under the RLA.

2. *Lingle* is Inapplicable to Preemption Under the RLA.

The *Lingle* test is inapplicable here because it addresses preemption under the LMRA, a statute significantly different from the RLA in its language, history, and purposes. The plaintiff in *Lingle* had been discharged by her employer on grounds that she had filed a false workers' compensation claim. 486 U.S. at 401. Pursuant to the arbitration provision of a collective bargaining agreement, the union filed a grievance on the employee's behalf. *Id.* at 401. Subsequent to the filing of the grievance, the employee also filed a state court action against her employer alleging wrongful discharge. *Id.* at 402. The issue in *Lingle* was whether the plaintiff's state law action was preempted by Section 301 of the LMRA,

which provides only that suits for breach of collective bargaining agreements may be brought in federal court. *See* 29 U.S.C. § 185. This Court ruled that Section 301 preempts a state law action only if "resolution of [that claim] depends upon the meaning of a collective-bargaining agreement. . . ." 486 U.S. at 405-06.

The *Lingle* preemption holding was carefully limited to the Congressional intent underlying Section 301. Indeed, the opinion clearly cautioned that it would be inappropriate to extend the *Lingle* test into other areas of preemption under other federal labor laws. 486 U.S. at 409 n.8 ("it is important to remember that other federal labor law principles may preempt state law"). A comparison of the statutory language, legislative history, and Congressional purposes of the RLA with the language, history, and purposes of Section 301 establishes that the *Lingle* preemption standard is inappropriate for determining RLA preemption.

Section 301 does not compel or mandate arbitration of workplace disputes. Neither the text nor the legislative history of Section 301 even mentions arbitration. Instead, arbitration under the LMRA is a matter of contractual undertaking between the parties and is purely voluntary. Thus, this Court recently held that under Section 301 an employee could file suit directly in federal court where the parties' collective bargaining agreement did not specifically commit resolution of a dispute to arbitration. *See Groves v. Ring Screw Works*, 498 U.S. 168 (1990).

The silence of the LMRA concerning arbitration differs markedly from the RLA, which mandates arbitration through adjustment boards. 45 U.S.C. §§ 153 First (i), 184. Moreover, while the LMRA does not purport to dictate the types of disputes to be submitted to arbitration under bargaining agreements, the RLA provides that certain types of claims must be resolved by an adjustment board regardless of whether the parties agree to do so. *Id.* Finally, the RLA by its terms and its legislative history commits non-contractual disputes concerning discharge and discipline to the adjustment

board process, while Section 301 is limited to contract disputes. *See* Part I *supra*.

Perhaps the best proof of the inapplicability of the *Lingle* standard to RLA preemption lies in the plain language of RLA Sections 3 First (i) and 204, 45 U.S.C. §§ 153 First (i) and 184, which detail adjustment board jurisdiction. Those provisions require arbitration of all disputes growing out of grievances or out of contract application in addition to all disputes growing out of contract interpretation. Since the *Lingle* test focuses solely on contract interpretation, it cannot be applied to RLA preemption because to do so would fail to protect the statutorily explicit adjustment board jurisdiction over disputes growing out of grievances or out of contract application.

In addition, Section 301 and the RLA have markedly different purposes which cannot be satisfied by applying the same preemption test. In enacting Section 301, Congress was seeking to assure uniformity in the interpretation of collective bargaining agreements. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962). Given that objective, it makes sense that the preemption test under 301 should focus on the narrow issue of whether a state claim will require interpretation of a collective bargaining agreement.

Congress expressed a much broader purpose in enacting the RLA. As discussed in Part I, *supra*, Congress sought to assure uniform, expeditious, and final resolution of disputes by boards composed of knowledgeable individuals dealing with complex, technical issues in the transportation industry. Congress wanted to keep employment disputes in the transportation industry out of the courts. Indeed, Congress has for almost seventy years maintained its vision of industry adjustment boards resolving a broad range of contractual and non-contractual claims as the best way to meet the many competing interests of employers and employees in rail and airline industries.

Finally, the *Lingle* standard – by allowing individual employees significant access to state courts – serves the

purpose in the LMRA setting of protecting individual employee non-contract rights. By contrast, Congress in the RLA – as this Court held in *Burley* – carefully assured that an individual employee's non-contract claims would be considered in the adjustment board forum. In the LMRA setting, an employee has no right to participate in or even require arbitration of his or her individual claim: that right rests exclusively with the employee's bargaining representative, subject to the duty of fair representation. *See supra* note 12. Therefore preemption of an employee's non-contract "wrongful discharge" claim under the LMRA scheme could mean that the employee would have no forum at all to have the claim resolved.

Under the RLA the employee is guaranteed a forum for resolution of a "wrongful discharge" claim because (1) Congress has required carriers to establish adjustment boards; (2) Congress has required those adjustment boards to resolve disputes "growing out of grievances," including non-contract claims (*see* discussion in Part I, *supra*); and (3) Congress has guaranteed individual employees the right to pursue those claims for themselves, with their own counsel, before the adjustment board (*see* discussion of *Burley supra* pp. 23-27).

Unlike the collective bargaining setting of the LMRA, a union and an employer covered by the RLA cannot lawfully reach an agreement extinguishing the individual employee's access to the adjustment board for resolution of individual claims, and therefore employees with such claims will always have a forum in the adjustment board. *See generally, Burley*, 325 U.S. at 740 n.39; *Capraro v. United Parcel Service Co.*, 993 F.2d 328, 336 (3rd Cir. 1993) (probationary employee could not be denied access to adjustment board for resolution of his individual "wrongful discharge" claim even though the collective bargaining agreement provided that it was inapplicable to probationary employees); *Slagley v. Illinois Cent. R.R.*, 397 F.2d 546, 551 (7th Cir. 1968) (employee's right to have claim resolved by adjustment board is "statutory and

cannot be nullified by agreement between the carrier and the union").

Any attempt by the adjustment board, the employer or the union to deny the individual employee access to the adjustment board could be met with a judicial order compelling arbitration. *See Capraro*, 993 F.2d at 337. Furthermore, a failure of an adjustment board to consider an employee's non-contract based claim involving significant public policies could be a basis for overturning the adjustment board's decision. *See Paperworkers v. Misco*, 484 U.S. 29, 43 (1987) (arbitral decision contrary to public policy may be set aside). That would certainly be the case if an adjustment board were to refuse to consider Norris' claims here, for the CBA itself in Article XVII.F mandates consideration of the public policies underlying federal and state safety laws. *See* discussion *supra* p. 33. Since individual employees – and Norris, in particular – are guaranteed the right under the RLA to have their non-contract "wrongful discharge" claims considered by an adjustment board, RLA preemption is properly much broader than LMRA preemption.

3. Norris' "Wrongful Discharge" Claims are Preempted by the RLA Even if the *Lingle* Standard is Used.

As discussed above, the *Lingle* standard is inappropriate for RLA preemption given the clear and obvious differences between the two legislative schemes. However, even if *Lingle* does apply, Norris' wrongful discharge claims are still preempted because they require interpretation of the CBA.

The CBA would have to be interpreted to determine whether Norris was in fact discharged, since "discharge" is an essential element of a wrongful discharge claim. Here, it was only at step 1 of the grievance procedure that a hearing officer recommended that Norris be terminated (Pet. App. 63a). Later, a step 3 hearing officer reduced the discipline to a suspension (Pet. App. 66a). According to the deposition testimony of arbitrator Ted T. Tsukiyama, the discipline that had

been meted out to Norris at the time Norris filed suit was a suspension under the provisions of the CBA (Jt. App. 306). Thus, in order to determine if Norris was discharged, it will be necessary to construe the CBA and its application and interpretation, as well as the CBA's grievance procedure.

Lingle also holds that there is preemption where interpretation of the bargaining agreement is required to resolve a defense presented in the case. 486 U.S. at 407.²⁶ The trier of fact in Norris' case will no doubt be called upon to interpret the CBA in evaluating Petitioners' defense to his wrongful discharge claims. Petitioners' basis for disciplining Norris was his refusal to sign off on a work record for work he claimed involved an unsafe aircraft part (Jt. App. 213). Article IV of the CBA specifically provides that an aircraft mechanic "may be required to sign work records in connection with the work he performs" (Pet. App. 49a). That provision of the CBA would have to be interpreted in order to

²⁶ The Solicitor General proposes a test for preemption that would ignore all but the affirmative proof offered by a plaintiff in determining whether the collective bargaining agreement is at issue. Brief of the United States as Amicus Curiae ("Br.") 11-12. This is not what *Lingle* suggests, and it is not workable or logical within the framework in which matters of fact are established at trial or hearing. The claim of improper motive cannot, as the Solicitor General suggests, be decided in a vacuum. Proof of improper motive will require evidence to disprove that the declared "proper" motive was in fact the basis for the discharge decision. Cf. *St. Mary's Honor Ctr. v. Hicks*, 125 L. Ed.2d 407 (1993) (defendant in Title VII suit has the burden of producing evidence of non-discriminatory motive once a prima facie case of discrimination is shown, but plaintiff's ultimate burden of persuasion includes the burden of disproving that proffered motive applies) (relying upon *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981)). Certainly, evidence of contractual provisions and the historical application of those provisions by the parties as to grounds for discharge and discipline will be considered in resolving the motive question. As the Court in *Lingle* recognized, construction of a bargaining agreement may be just as much at issue in the refutation of a claim as in its prosecution.

resolve Norris' wrongful discharge claims because the provision would justify Hawaiian Airlines' discipline of Norris if the work record he was asked to sign did not cover the allegedly defective axle sleeve.²⁷

Finally, the Hawaii court has already demonstrated in its decision that *Lingle* preemption should apply because the court conducted its own analysis of one substantive and one remedial provision of the CBA and limited the breadth of those provisions without the benefit of an adjustment board determination. In particular, the court limited the scope of Article XVII.F, which protects employees from discipline for refusal to work in violation of state or federal safety laws (*see discussion supra* p. 33 & n.22), and the court also found that no punitive damages were available to employees under the CBA (*see supra* note 5) (Pet. App. 19a-20a, 24a). By independently interpreting and sharply curtailing the rights and remedies available to employees under the CBA, the Hawaii state court has already done what the *Lingle* standard was designed to prevent – interpret the collective bargaining agreement.

In sum, since essential elements of Norris' claims and the Defendants' defense will require interpretation of the CBA, Norris' wrongful discharge claims would be preempted even if the narrower *Lingle* standard were to be applied.

²⁷ Norris' supervisor, Justin Culahara, has testified during deposition that he told Norris, at the time he asked him to sign the work record, that he was not asking him to sign for the condition of the axle sleeve because Culahara himself and inspector Henry Wong had already signed a separate work record regarding the axle sleeve. Culahara instead asked Norris to sign off for the tire change, in which Norris had participated (Jt. App. 82). Culahara's supervisor has also testified that Norris was free to place a note on the work record he was asked to sign indicating that he, Norris, considered the axle sleeve to be unairworthy (Jt. App. 80).

B. ALEXANDER V. GARDNER-DENVER DOES NOT WEIGH AGAINST SYSTEM BOARD RESOLUTION OF CLAIMS

The Solicitor General cites (Br. 13 n.10) *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974), for the proposition that arbitrators exceed their authority when they rely upon sources of law outside of the collective bargaining agreement. That is an erroneous reading of the decision. The *Alexander* case held that an employee's submission of a discharge claim to arbitration under a nondiscrimination clause of a collective bargaining agreement did not preclude him from bringing a Title VII action in federal court. *Id.* at 59-60. The decision lends no support whatsoever to the idea that arbitrators may not determine matters of external law.²⁸ Indeed, this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26 (1991), conclusively demonstrates that statutory claims such as those under Title VII may be submitted to binding arbitration.

To the extent that the *Alexander* Court was concerned with an individual employee's ability to have his or her claim fairly processed by a union through arbitration, that concern is not present where there is an RLA adjustment board. As previously discussed, the RLA allows employees to proceed independently, with counsel of their choice, through the adjustment board process. 45 U.S.C. § 153 First (i) and (j). An employee covered under the RLA possesses substantive individual rights, and the union may not settle a claim that those rights have been violated without the employee's active participation and approval. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 740, n.39 (1945).

²⁸ In addition, the *Alexander* decision has no bearing on preemption analysis here because it involved the accommodation of federal laws, an issue far removed from the preemption doctrine, which concerns the primacy of federal laws over competing or related state laws. See also *Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557, 566-67 (1987).

Moreover, even if there were opportunities for conflicts within the bargaining unit in RLA cases, these conflicts should not be presumed to exist in the absence of some showing that the union would be less than vigilant in pursuing an employee's external law claims in arbitration. The facts of the present case show vigorous pursuit, and success, by the union in dealing with Norris' claims prior to Norris dropping out of the adjustment board process (Pet. App. 63a-66a). In sum, the Solicitor General's reliance on the *Alexander* decision is misplaced.

C. COLORADO ANTI-DISCRIMINATION COMMISSION IS INAPPOSITE

This Court's decision in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), relied upon by the Solicitor General (Br. 12-13), is likewise inapposite to this case. In *Colorado Anti-Discrimination Commission*, this Court held that the RLA did not preempt a claim under a state law prohibiting racial discrimination in hiring. Since the plaintiff there had not been hired by the company, there was no way for him to process a grievance under the RLA dispute resolution procedures. See 45 USC §§ 151 Fifth and 181 (defining "employee" for purposes of the RLA) and 45 U.S.C. §§ 153 First (i), 184 (limiting adjustment board jurisdiction to disputes involving one or more "employees"). See also, *Nelson v. Piedmont*, 750 F.2d 1234, 1237 (4th Cir.) (applicant is not an "employee" under the RLA), *cert. denied*, 471 U.S. 1116 (1985). Therefore, since the plaintiff in *Colorado Anti-Discrimination Commission* could not have turned to an RLA adjustment board for resolution of his dispute, the Court properly found that his claim was not preempted.

Moreover, the arguments raised by the Solicitor General regarding the *Colorado Anti-Discrimination Commission* case are spurious. First, the Solicitor General's concern that RLA preemption would "substantially displace state regulation" (Br. 13) is ill-founded. Displacement of state law lies at the

very heart of the preemption doctrine. Since displacement of state law is the intended result of broad federal legislation, it is hardly grounds for objection in a preemption case. In any event, employees' non-contract-based state claims are given consideration under the RLA adjustment board scheme. See discussion *supra* Part I.

The Solicitor General's fear (Br. 13) that arbitrators will be required to adjudicate issues of state tort law is equally unwarranted. As the Solicitor General concedes, this Court has already held in *Gilmer* that arbitrators may adjudicate statutory claims. The Solicitor General attempts to distinguish *Gilmer* by emphasizing that *Gilmer* involved an individual employment contract as opposed to a collective bargaining agreement, and therefore there was no "tension between collective representation and individual statutory rights." Solicitor General's Br. at 13, n.10, citing *Gilmer*, 111 S. Ct. 1547, 1657 (1991). The Solicitor General's argument is erroneous because under the RLA employees are free to pursue their claims independently. Therefore, an RLA claimant is as free from the tensions of collective representation as the plaintiff in *Gilmer*.

D. CONRAIL'S MINOR DISPUTE TEST IS NOT APPROPRIATE FOR DETERMINING THE SCOPE OF RLA PREEMPTION, AND IS SATISFIED IN ANY EVENT.

The Solicitor General urges (Br. 8-11) that the standard for recognizing a "minor" dispute articulated in *Conrail*, 491 U.S. 299 (1989), should be used as the test to determine whether a given state law dispute is preempted. There is no valid reason for extending *Conrail* into the preemption area. The issue in *Conrail* was whether a particular dispute – indisputably within RLA jurisdiction – was "major" and thus required the maintenance of the status quo pending bargaining procedures, or "minor" and hence referable to arbitration. 491 U.S. at 307. There was no issue of RLA preemption because

there was no question whether the dispute would be resolved through RLA procedures.

The language and logic of *Conrail* make clear that it was not intended by this Court to address the question of preemption of state law claims arising from airline or railroad employment disputes. If this Court had intended to hold that only those disputes arguably governed by a bargaining agreement are cognizable by RLA adjustment boards, it no doubt would have analyzed the statutory language which by its terms extends adjustment board jurisdiction to non-contractual claims. The Court also would have explained why its holding in *Burley* recognizing the "omitted case" had been overruled. Instead, the *Conrail* Court is silent about the reach of the plain language of the RLA and actually quotes *Burley* – including the "omitted case" discussion – with approval. See *Conrail*, 491 U.S. at 303. The *Conrail* Court's failure to address these matters suggests it had no intention of providing a standard for RLA preemption of state law claims.

Moreover, even if *Conrail* does provide the standard for determining when state law claims are preempted by the RLA, that standard is satisfied here. The terms of the CBA could "conclusively resolve" (*Conrail*, 491 U.S. at 305) Norris' claims. For example, as the Solicitor General admits (Br. 10-11, 14), Norris will have to show that he was in fact discharged. There is certainly a question on the record whether Norris was terminated, since the employer mitigated his punishment to a suspension during the grievance proceedings before Norris filed suit. Similarly, there is a legitimate question whether Norris' discipline was "arguably justified" (*Conrail*, 491 U.S. at 307) by the CBA as "for cause" (CBA Art. IX.I.5, Pet. App. 50a). Finally, since the CBA by its express terms permits the company to require an employee to sign off on work records (CBA, Art. IV.D.4(a), Pet. App. 49a), and conversely provides that an employee may not be disciplined for refusing to perform work in violation of federal or state health and safety laws (CBA, Art. XVII.F, Pet. App. 60a-61a), Norris' claims certainly would have been

conclusively resolved by the adjustment board if Norris had not abandoned the CBA's grievance process. See discussion *supra* pp. 43-45.

CONCLUSION

For the reasons set forth herein, Petitioners urge that the Hawaii Supreme Court's decision should be reversed and remanded with instructions to reinstate the circuit court's rulings dismissing Count I of Norris' complaint against Hawaiian Airlines and Counts I and II against the Individual Defendants on preemption grounds.

Respectfully submitted,

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No. 92-2038

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC. and
PAUL J. FINAZZO, HOWARD E. OGDEN and
HATSUO HONMA,

Petitioners,
v.

GRANT T. NORRIS,
Respondent.

On Writ of Certiorari to the
Supreme Court for the State of Hawaii

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

A. *Facts.* Grant T. Norris was a licensed aircraft mechanic hired by Petitioner Hawaiian Airlines, Inc. ("HAL") on February 2, 1987. Joint Appendix ("Jt. App.") 21. Norris' license from the FAA authorized him to approve and return to service an aircraft after making, supervising, or inspecting certain repairs. Jt. App. 20-21. *See also* 14 C.F.R. §§ 65.85, 65.87. A mechanic approves an aircraft by signing the maintenance record. 14 C.F.R. § 43.9(a)(4). The mechanic may not approve for service any aircraft or part if the repair is not in accordance with the manufacturer's instructions or specifications or if the repair does not conform to the Federal Aviation Regulations ("FAR's"). 14 C.F.R. §§ 43.9, 43.13. If a mechanic makes a fraudulent or intentionally false entry in a record or report required by the FAR's, the FAA may suspend or revoke the mechanic's license or assess a fine. 49 U.S.C. §§ 1429, 1471; 14 C.F.R. § 43.12.

On a routine preflight inspection of one of HAL's DC-9 aircraft, Aircraft 70, in the early morning of July 15, 1987, Norris noticed that one of the main landing gear tires was worn. Jt. App. 21. The tire and bearing were removed, and Norris and the other mechanics present saw that the axle sleeve underneath, which normally has a mirror-smooth surface, was scarred and grooved, with gouges and burn marks clearly visible. Jt. App. 21.

Norris and other mechanics who saw the sleeve thought it was unsafe and needed to be changed. Jt. App. 22. However, their supervisor, Justin Culahara, ordered them to hand sand the sleeve and put a new bearing and tire over it. Jt. App. 22-23, 181-86. Culahara then ordered Norris to "sign off" on the maintenance record for installation of the tire. Jt. App. 23. A mechanic's signature on a maintenance record is a certification that a repair has been performed satisfactorily. 14 C.F.R. § 43.9(a)(4). Norris refused to sign, saying that he had not

actually performed the tire installation. Jt. App. 23. Ultimately, the maintenance record, bearing identification numbers of mechanics other than Norris, pronounced that the tire assembly had been replaced and that the brakes were satisfactory. Record in Civil No. 87-3894-12 ("R"), vol. 17 (Deposition of Justice Culahara, vol. 1, June 28, 1989, at 120-25 and Exhibit 6).

Culahara suspended Norris on the spot, pending a termination hearing. Jt. App. 23. Aircraft 70 carried passengers on numerous flights with the damaged axle sleeve in place. Jt. App. 120-22.

On July 15, 1987, Norris contacted the FAA to say that there was a problem with the HAL aircraft that he had serviced. Jt. App. 23. Norris then met with a Norman Matsuzaki, Culahara's superior, to tell him what had happened. Norris mentioned his contact with the FAA. Matsuzaki chased Norris from his office, assuring Norris that Norris was "gone." Jt. App. 24.

Norris invoked the grievance procedure outlined in the collective bargaining agreement between the International Association of Machinists and HAL. Jt. App. 96. The agreement stated that an aircraft mechanic "may be required to sign work records in connection with the work he performs." The agreement also required suspensions or discharges to be "justified." Appendix F at 49a, 53a-54a of Appendix to the Petition for a Writ of Certiorari ("Pet. App."). Norris' termination hearing was held on July 31, 1987. Matsuzaki presided over the hearing and terminated Norris for "insubordination."¹ Jt. App. 97-99. Before the next step of the grievance process, HAL's Vice President of Maintenance and Engineering, Howard E. Ogden, offered to "mitigate" Norris' punishment to suspension without pay. Ogden explicitly warned that "any further instance of failure to perform your duties in

¹ Petitioners' brief suggests that, rather than being "terminated," Norris was only "recommended" for termination. Brief for Petitioners ("Pet. Brief") at 34, 43. Yet, Norris was given a document that stated, "Mr. Grant Norris *terminated* as of this day, August 3, 1987, for insubordination." Jt. App. 214 (emphasis added).

a responsible manner" could be punished by discharge. HAL wrote to Norris' union representative and stated that HAL's action "negates the need" for any further hearing. Jt. App. 100-01, 207-12, 261-19. Norris refused to accept the reinstatement offer under the circumstances. He filed suit against HAL in state court on December 8, 1987. Jt. App. 3-11.

As a result of information provided by Norris, the FAA seized the axle sleeve on August 4, 1987, and began a comprehensive investigation of the matter. Jt. App. 120-31. *See also* R., vol. 17 (Deposition of Richard S. Teixeira, Records of Federal Aviation Administration, Dec. 6, 1989). On March 2, 1988, the FAA proposed a civil penalty of \$964,000.00 against HAL on the basis of 958 flights Aircraft 70 had made with the damaged sleeve. Jt. App. 120-22. The FAA inspector who seized the sleeve found it to be damaged beyond allowable repair limits. Jt. App. 121-22. The FAA proposed to revoke the FAA license of Culahara, the supervisor who had suspended Norris. Jt. App. 125-28.

In September 1987, the FAA notified HAL that it intended to inspect the axle sleeves of two other aircraft in HAL's fleet. Before the inspection could take place, however, HAL replaced the sleeves on those aircraft. The FAA demanded that the sleeves that had been removed be turned over, but HAL said that it had "misplaced" or "lost" at least six of the eight replaced sleeves.²

B. *Proceedings.* Norris' suit against HAL alleges that his discharge violated public policies articulated in the Federal Aviation Act and the FAR's. Jt. App. 3-7. Count I of the Complaint was based on *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982), which held that it was against the public policy of Hawaii for an employer to fire an employee for reporting violations of law. HAL

² The FAA issued a report finding evidence that HAL employees had intentionally "lost" the sleeves. Jt. App. 62, 64 n.37. Eventually, HAL settled all pending FAA charges for a substantial fine. Jt. App. 292-94.

removed the entire case to federal district court (R., vol. 1, at 48-91), where the question of whether federal labor law preempted the case was litigated. The federal court remanded the public policy discharge claim, among others. Jt. App. 331-45. HAL moved for reconsideration, which the federal district court denied, citing *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). Jt. App. 346-67.

In state court, HAL moved to dismiss Norris' claims on the ground that the state court lacked subject matter jurisdiction. R., vol. 5, at 1-136. The state trial court granted that motion as to Count I but not as to other counts, then certified its order as final under Haw. R. Civ. P. 54(b), leaving for trial Norris' other claims. R., vol. 29, at 105-08. Norris appealed from the judgment dismissing Count I against HAL and also from rulings in favor of Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma, (R., vol. 29, at 117-26), who were defendants in Civil No. 89-2904-09, with which Norris' case against HAL had been consolidated. R., vol. 18, at 407-08. The rulings in favor of the three individuals had dismissed Counts I and II, both of which alleged violations of public policy.³

The Hawaii Supreme Court reversed the state trial court's judgment in *Norris v. Finazzo* and in *Norris v. HAL*. See 824 P.2d 634 (1992), and Pet. App. B & C. This Court granted the certiorari petition filed by HAL and the individual defendants.⁴

³ Count II of the Complaint against HAL alleged statutory violations of the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. §§ 378-61 to 378-69. Jt. App. 7-8. Count II of the Complaint against the individual defendants, by contrast, stated a common law claim based on an alleged violation of the public policy evidenced in the Hawaii Whistleblowers' Protection Act. The statutory claim asserted against HAL has never been part of any appeal; no appealable ruling on that claim ever issued. R., vol. 6, at 317-18; vol. 29, at 1-3.

⁴ HAL has gone into bankruptcy; the parties have stipulated in the bankruptcy court to the processing of the present appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether an airline employee is precluded by the Railway Labor Act ("RLA") from seeking relief under a state law common law cause of action for retaliatory discharge.

I. As we show in Part I, *infra*, the suggestion that Congress, in enacting the RLA, intended substantively to displace state law minimum employment standards is not only insupportable on the most basic of preemption principles but is flatly contrary to a long line of cases in this Court. From *Missouri Pacific Railroad Co. v. Norwood*, 283 U.S. 249 (1931), to *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), this Court has consistently maintained that the RLA does not speak at all to substantive employee protections, and does not displace public law principles providing such protections to employees.

II. Petitioners alternately argue that Congress, in the RLA's "minor dispute" provisions, directed that all employment-related disputes, including those governed by law external to collective bargaining agreement, be submitted to RLA adjustment boards. As we show in Part II, *infra*, the requisite evidence of such an intent is sorely lacking. None of the cases rejecting substantive preemption so much as hints that the surviving claims should be resolved by adjustment boards. The language of the RLA does not, as petitioners maintain, indicate, through the use of the term "grievance," that noncontractual causes of action, were intended to be submitted to RLA adjustment boards. This reading of the statute is confirmed, moreover, by the legislative history of the RLA. And the agency designated by Congress to administer the RLA dispute resolution mechanism, the National Railroad Adjustment Board, has over the years repeatedly stated its understanding that its jurisdiction extends only to contract-based claims. Further, any doubts regarding the

Meanwhile, Finazzo and Honma were recently granted summary judgment by the state court on claims not before this Court.

RLA's meaning must be resolved against petitioners' version, since that construction would create serious constitutional issues under the Seventh Amendment.

Petitioners maintain, however, that in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945), this Court has concluded otherwise. *Burley* does indeed contain some language, albeit in *dicta*, that can be read to suggest that adjustment boards have jurisdiction to consider noncontract-based issues. But the meaning of that *dicta* is not clear, and has never been followed in any case of this Court. And *Burley* was premised upon the assumption, overruled by this Court in a line of cases culminating in *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), that use of the RLA minor dispute resolution mechanism is discretionary, not mandatory; thus, the *dicta* in *Burley*, in context, does not support any preemptive conclusion. Moreover, the line of cases culminating in *Andrews* makes clear that the RLA dispute resolution mechanisms are exclusive only with respect to *contract-based* claims.

III. Petitioners also suggest that, even if their broad submission is incorrect, there is some basis for RLA preemption of a case that is not contract-dependent, if a parallel case could have been brought, on the same facts, under the collective bargaining agreement and its grievance procedures. This is not the rule under the NLRA; *Lingle, supra*, makes clear that § 301 of the Labor-Management Relations Act, ("LMRA") does not displace state causes of action that simply parallel contractual causes of action but do not depend on the agreement for resolution. As we show in Part III, *infra*, there is no basis for any other rule under the RLA. Because Norris' causes of action are not contract-dependent, the judgment below should be upheld.

ARGUMENT

I. THE RAILWAY LABOR ACT DOES NOT DISPLACE STATE LEGAL RULES PROVIDING SUBSTANTIVE PROTECTION FOR EMPLOYEES.

The question presented in this case is whether the Hawaii Supreme Court erred in concluding that its state law of retaliatory discharge is *not* preempted by the Railway Labor Act ("RLA"). Petitioners' essential submission is that the state law *is* preempted. According to petitioners the RLA precludes states from applying their statutory or common law minimum labor standards to employees subject to an RLA collective bargaining agreement, and from providing for state court jurisdiction over a suit by an RLA-covered employee who brings *any* employment-related claim—including a claim under such state law. This is so, petitioners assert, even if the state law claim asserted does not rest in any way on the governing labor agreement. *See, e.g.*, Pet. Br. at 14-15.⁵

Petitioners' argument is grounded on a profound misunderstanding of the RLA's language and purpose, and of this Court's RLA jurisprudence. The RLA is concerned in its entirety with the formation and the functioning of collective bargaining relationships in the railroad and airline industries. The statute contains provisions governing the selection of collective bargaining representatives (45 U.S.C. § 152, Third & Ninth); protecting union organizing and independence (§ 152, Fourth & Fifth); and, most prominently, regulating the process of collective bargaining and the settlement of disputes concerning bargaining and the resulting collective agreement. (§§ 152, Sixth & Seventh, §§ 155, 156, 157, 158, 159, 160). In the last regard, the RLA requires that "disputes growing out of grievances or out of the interpreta-

⁵ Thus petitioners maintain that "the RLA scheme supports preemption of state 'wrongful discharge claims,' not just adjudication of those claims by RLA adjustment boards. And they so maintain "... even if that means that state law rights and remedies will be lost." Pet. Br. at 30. *See also id.* at 34.

tion or application of agreements covering rates of pay rules, or working conditions" (commonly called "minor disputes"),⁶ be resolved: through conferences between the carrier and the "representative or representatives . . . of [the] employees," § 152, Sixth; *see also* § 153, First (i); § 184; and if that method fails, by an adjustment board composed of representatives of the carriers and unions, § 153, First (i), Second; § 184.⁷

Nothing in the RLA treats with, much less determines, the substantive rules that will govern matters such as employee safety, recompense for workplace injuries, employment discrimination and harassment, minimum wages and their payment or—most pertinent to this case—recourse against retaliatory discharges (other than discharges in retaliation for exercise of those rights created by the RLA itself, *see* § 152, Third).

While as a general proposition all these matters are governed by statutory and common law minimum labor standards norms, petitioners claim that in enacting the RLA over sixty years ago, Congress displaced all such individual employee legal protections for rail and airline employees covered by collective bargaining agreements.

A. Even as an initial proposition, petitioners' sweeping preemption argument necessarily fails the most basic governing standards. Federalism principles counsel that, in preemption cases generally, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the

⁶ *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives Ass'n* ("Conrail"), 491 U.S. 299, 301-04 (1989).

⁷ There is a difference, not here material, between the railroad and airline industries. Railroad disputes are ordinarily directed by the union and employer to the National Railroad Adjustment Board created by the statute (although alternative adjustment boards are allowed). Since no such national board has ever been created for the airlines, separate system adjustment boards created by the airlines and the unions through collective bargaining resolve airline disputes. *See* 45 U.S.C. §§ 153, 184; *see also Conrail*, 491 U.S. at 301-04.

clear and manifest purpose of Congress.'" *Hillsborough County Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). As the Court said in *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988), "to say that [pervasive preemption] can be created is not to say it can be created subtly."

Congress has never made "clear and manifest" any intention to preempt state minimum labor standards laws generally, or, state wrongful discharge laws in particular. Nothing in the "plain language" of the RLA restricts states from acting affirmatively to protect employees in the industries covered by the statute. The RLA is quite distinct from federal *substantive* labor standards laws in this particular.⁸ And, while petitioners point repeatedly to portions of the RLA legislative history that, in their view, indicate that Congress was concerned about uniformity in the regulation of the airlines and railroads, such generalized concerns, standing alone, are not sufficient to provide the requisite clear indication of preemptive intent:

While we have frequently said that pre-emption analysis requires ascertaining congressional intent, *see, e.g., Louisiana Public Service Comm'n*, [476 U.S. 355, 369 (1986)] we have never meant that to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text. There is no text here . . . that might plausibly be thought to imply exclusivity—to which expressions of pre-emptive intent in legislative history might at-

⁸ *See, e.g.,* 29 U.S.C. § 1144(a) (Employment Retirement Income Security Act preemption); 29 U.S.C. § 667 (Occupational Safety & Health Act preemption); 45 U.S.C. § 484 (Federal Rail Safety Act preemption).

We note that such federal minimum employment standards statutes may, in fact, preempt some state causes of action for retaliatory discharge. *See, e.g., Ingersoll-Rand Corp. v. McClendon*, 111 S.Ct. 478 (1990).

tach. . . . [U]nenacted approvals, beliefs, and desires are not laws. Without a text that can, in light of those statements, plausibly be interpreted as *prescribing* federal pre-emption it is impossible to find [preemption of state employee-protective rights]. [*Puerto Rico Dept. of Consumer Affairs*, 485 U.S. at 501 (emphasis in original).]

See also *CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct., 2608, 2618 (1992); *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2481-83 (1991).

Nor is there any possible argument that Congress, in enacting the RLA, has "so thoroughly occupie[d the] legislative field" of employee protective rules in the railroad and airline industries "as to make reasonable the inference that Congress left no room for the States to supplant it." *Cipollone*, 112 S. Ct. at 2617 (quoting *Fidelity Federal Savings & Loan v. De la Cuesta*, 458 U.S. 141, 153 (1982)). To the contrary, while the RLA regulation of the formation and the functioning of the collective bargaining system is pervasive—and the RLA is therefore broadly preemptive with regard to matters concerning union organization, collective bargaining, and the parties use of economic weapons⁹—the RLA does not, as we stated at the outset, address the subject of individual employee protections at all.

B. Putting that threshold point to the side, the particular preemption question here—whether or not the RLA displaces all state employee protective causes of action—is not new to this Court. To the contrary, by the time this Court, in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), unanimously *rejected* the argument that the National Labor Relations Act ("NLRA") scheme of free collective bargaining pre-empts all state minimum labor standard laws, the Court's

⁹ See, e.g., *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

decisions had already repeatedly rejected that same argument in the RLA context.

Metropolitan Life ruled that the federal scheme of collective bargaining is by design interstitial and meant to supplement rather than to displace state and federal minimum labor standard protection laws. The collective bargaining laws, said the Court, were "developed . . . within the larger body of state law promoting public health and safety." 471 U.S. at 756. "[N]o incompatibility exists, therefore, between federal rules designed to [protect collective bargaining] and state or federal legislation that imposes minimal substantive requirements on contract terms." *Id.* at 754; see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).

The *Metropolitan Life* Court recognized that its conclusion on the interplay between the NLRA and state minimum labor standard laws applied and reaffirmed the identical conclusion previously reached in the RLA setting. 471 U.S. at 757, n. 32. The first of these cases was *Missouri Pacific Railroad Co. v. Norwood*, 283 U.S. 249 (1931). There, one of the employer's arguments against application of a state law regulating the number of employees required to operate certain railroad equipment was that, by enacting the RLA, Congress created a federal forum to resolve "disputes between a carrier and its employees arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." *Norwood*, Appellant's Brief at 73 (quoting the RLA, emphasis in original). The railroad argued that Congress' decision to have a federally created and sanctioned board resolve such disputes necessarily deprived the states of any authority to enact or enforce any legal rules whatsoever governing the railroad employment relationship. *Id.* at 74-76. The Court determined that this argument—similar in form to the argument made by petitioners here—merited the following response: "No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas stat-

utes under consideration." 283 U.S. at 258. See also *Brotherhood of Locomotive Engineers v. Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966).

The next case in this line is on all fours with the case currently before the Court. In *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), rail employees covered by the RLA eschewed remedies available through the RLA National Railroad Adjustment Board ("NRAB") and, instead, brought a claim before the Illinois Commerce Commission challenging their employer's failure to provide cabooses on all of its trains operating within the state. The Commission ordered the railroad to provide the cabooses, and the State Supreme Court affirmed the order. *Id.* at 3.

Before this Court, the railroad argued that the governing labor agreement required cabooses only on some of the trains, and that the dispute should have been resolved by the NRAB. The Court framed the issue presented, and resolved that issue, as follows:

We assume, without deciding, that the demand for additional caboose service and its refusal constitute a dispute about working conditions, and that the National Railroad Adjustment Board would have jurisdiction of it on petition of the employees or their representative and might have made an award such as the order in question or some modification of it. The question is whether the Railway Labor Act, so interpreted, occupied the field to the exclusion of the state action under review. We conclude that it does not. . . . [318 U.S. at 6.]

In reaching its conclusion, the Court recognized that railroad operations are inevitably interstate in nature, and that, in the absence of yard facilities at the state border, the result of its decision would be that the railroad would have to operate cabooses even outside of the state's boundary. 318 U.S. at 8. But the Court nevertheless concluded as follows:

The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. . . .

State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. . . . [I]t cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves. . . . [318 U.S. at 6-7 (citation omitted).] ¹⁰

¹⁰ *Terminal Railroad* was decided prior to this Court's decision in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), making clear that adjustment board jurisdiction over minor disputes is exclusive. See *infra* pp. 37-39. As the quotation in text makes clear, however, and as the reliance on *Terminal Railroad* in *Metropolitan Life* confirms, *Terminal Railroad*'s holding did not at all depend upon an understanding that the Board and the courts had concurrent jurisdiction over minor disputes.

We submit that *Norwood*, *Terminal Railroad* and *Metropolitan Life* require rejection of petitioners' RLA preemption argument and are thus dispositive here. It is telling in this regard that petitioners fail entirely to do business with these precedents.

C. Notwithstanding the foregoing, we would be derelict if we did not add that the Court has recently rejected the argument for RLA substantive supremacy over a federal labor standards statute. In *Atchison, Topeka and Santa Fe R. Co. v. Buell*, 480 U.S. 557 (1987), the employer argued that the RLA precluded the resolution through a court trial of an employee's personal injury claim brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 151-60. Because the dispute between the employer and employee in question could have been resolved by the relevant adjustment board as "a labor grievance under the RLA," *id.* at 559, said the employer, "an FELA action for damages is barred," *id.* at 564. The employee, on the other hand, argued that nothing in the RLA limited railroad employees' FELA rights.

The *Buell* Court rejected the employer's RLA supremacy argument, reiterating the consistent conclusion of *Norwood*, *Terminal Railroad* and *Metropolitan Life* that rights that derive from sources other than a labor agreement are in no way compromised by the RLA:

The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. . . . The FELA not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be

denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion. [480 U.S. at 564-65.]

Since, as this Court has held in *Metropolitan Life*, there is "no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards," 471 U.S. at 755, *Buell* provides still further support for the proposition that the RLA does not operate to strip railroad and airline employees covered by an RLA collective bargaining agreement of rights otherwise available to employees generally.

II. THE RLA DOES NOT REQUIRE THAT EXTRACTIONAL CAUSES OF ACTION BE HEARD BY ADJUSTMENT BOARDS.

In a variation on the theme that the RLA substantively preempts state labor standards laws, petitioners argue that even if the RLA does not eliminate a railroad or airline employee's state labor standards laws cause of action, the RLA does have a preemptive force that relegates all such cases to arbitration within the RLA minor dispute resolution system.¹¹ Given petitioners' emphasis on this "jurisdictional" preemption claim, we consider the point in detail. So that we are not misunderstood, however, we state at the outset that the preemption arguments rejected in *Terminal Railroad* and *Buell* were in fact premised on a similar theory and that those precedents govern this phase of the instant case and require rejection of petitioners' position.

A. It facilitates analysis to have firmly in mind the adjudicatory system to which, petitioners would have it,

¹¹ As we point out later, however, the NRAB and the airlines system boards of adjustment have always refused to hear issues based upon law external to the contract. See pp. 30-32, *infra*. Therefore, petitioners' apparently jurisdictional argument will have the actual substantive effect of stripping RLA employees of their noncontractual rights, contrary to this Court's cases just discussed.

the RLA allocates the determination of all common law and statutory employment-related causes of action.

As the [National Railroad Adjustment] Board has operated in practice, the procedures followed in holding hearings have been quite informal and have differed from the trial-type hearings conducted by other agencies. . . . Disputes are referred to the Adjustment Board by the filing of written submissions. . . . It would be most extraordinary for live testimony to be given by witnesses. There is no requirement that a factual submission or other written statement be sworn. There is no cross-examination of witnesses and no record of the transcript of proceedings. There is no provision for issuance of subpoenas or compulsory attendance of witnesses. [Hearings on H.R. 706 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 89th Cong., 2d Sess., 49 (1966), reprinted in *IV The Railway Act of 1926: A Legislative History* (Michael H. Campbell & Edward C. Bremer III, eds., 1988) ("Leg. Hist.").]¹²

See also *id.* (NRAB exempted from the Administrative Procedures Act, 5 U.S.C. §§ 500, *et seq.*); 29 C.F.R. § 301.1.

As this Court has repeatedly indicated, these exceedingly informal procedures are suitable to the purpose of determining the application of the labor agreements in the airline and railroad industries to particular factual situations. See cases cited at pp. 31, *infra*. Given the nature of the *fora*, however, it would be odd indeed if Congress had *mandated* that noncontractual, individual common law and statutory causes of action be tried before

¹² As noted previously, airline cases are heard not by the NRAB but by system boards of adjustment created by the parties to collective bargaining agreements. While such boards may have more formal procedures, the statutory intent argument must be evaluated with regard to the NRAB, since that is the adjudicatory body Congress had in mind in 1934 when it mandated use of the adjustment board procedure.

the NRAB and the other RLA adjustment boards.¹³ As we now show, the statutory language, history and structure, as well as its administrative interpretation and its interpretation in this Court, all demonstrate that Congress has *not* done so.

B. Petitioners and their *amici* base their jurisdictional argument on the RLA's description of the minor dispute resolution mechanism as one that covers controversies "growing out of grievances *or* out of the interpretation or application of agreements." 45 U.S.C. § 153 First (i) (emphasis added). Pet. Br. 9-11.¹⁴ The plain meaning of this phrase, it is insisted, requires that the term "grievances" must mean something other than a type of contractual dispute—indeed, must include *all* disputes that might arise in the workplace, including the dispute at issue here.

(i) Petitioners' argument that the plain meaning of "grievances" denotes extracontractual claims flies in the face of what has been the universal previous understanding of that term. This Court's RLA/NLRA decisions, in a variety of contexts, routinely use the term "grievance," and on every occasion of which we are aware, the word has been used to refer uniquely to disputes over the meaning or application of labor agreements. For example, in *Paperworkers v. Misco*, 484 U.S. 29 (1988), the Court observed that "[c]ollective-bargaining agreements com-

¹³ *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991), and other cases concerning *voluntary* arbitration agreements do not detract from the conclusion that *mandatory* relinquishment of ordinary procedural protections for the determination of individual, governmentally-created rights is an intention not lightly ascribed to Congress.

¹⁴ Petitioners also mention that § 152 First provides generally for a duty "to settle all disputes, whether arising out of the application of such agreements or otherwise." The obvious reference of the "or otherwise" in that provision, however, is to the obligation to negotiate concerning major disputes, which involve the formation or modification of other contracts rather than their application. See 45 U.S.C. § 152, Seventh; *Conrail*, 491 U.S. at 302-04.

monly provide grievance procedures to settle disputes between the union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances." *Id.* at 36. Particularly, the Court has adopted this same understanding of "grievance" as the term is used in the RLA:

The grievances for which redress is sought . . . are admittedly 'minor disputes' as that phrase is known in the parlance of the Railway Labor Act. *These are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving one employee.* [*Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 33 (1957) (emphasis added.)]

If this were not enough, petitioners' argument about the "plain meaning" of the word "grievance" is wholly at odds with the way that word is used in its own collective bargaining agreement establishing the system board of adjustment to which petitioners would remit Norris' cause of action. For in that agreement it is specified that arbitration is available only for "grievances which may arise under the terms of this agreement." Pet. App. 51a. *See also* Pet. App. 54a (parties understanding that a system board so limited is in compliance with RLA); *id.* 55a ("The Board shall not have jurisdiction or power to add or subtract from this agreement").

(ii) Notwithstanding all of this, petitioners insist that to give full meaning to the disjunctive "or" in § 153 First, "grievance" must mean all employment-related disputes, including disputes based on the assertion of a statutory or common law right. This "plain meaning" argument is grounded on two assumptions, neither of which has merit either as a general matter, or in this particular case. The first assumption is based upon the canon of statutory construction that "the construction of a statute is preferred which gives to all words in it an operative meaning." *Early v. Doe*, 16 How. 610 (1853). Relying on that maxim, petitioners argue that the language on either side of the disjunctive "or" must

refer to different kinds of claims. But it is equally a maxim of statutory interpretation that a statute is to be read as a whole, since the meaning of all statutory language can only be understood in context. *See, e.g., King v. St. Vincent's Hospital*, 112 S.Ct. 570, 574 (1991). The assumption that Congress necessarily intended different words to connote wholly different concepts, without regard to the overall context in which the words appear, is not a sound one, and certainly is not one the Court has accepted when it has undertaken to interpret federal labor legislation. *See Pipefitters v. United States*, 407 U.S. 385, 421-22 (1972). *See also* Sutherland, *Statutory Construction*, § 46.05 ("courts should not rely too heavily upon characterizations such as 'disjunctive' or 'conjunctive' forms to resolve difficult issues, but should look to all parts of the statute").

The need to consider the context is especially relevant when considering the language of the RLA. As the Court has recognized:

[T]he Railway Labor Act of 1926 came on the statute books through agreement between the railroads and the railroad unions on the need for such legislation. It is accurate to say that the railroads and the railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their agreement. [*Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 240 (1956) (Frankfurter, J., concurring.)]¹⁵

This origin is significant in considering the pertinent language for two reasons: First, as a negotiated statute, the RLA is likely to be characterized by protective drafting, where one side insists on certain language simply to assure against a restrictive interpretation of other, arguably synonymous or broadly overlapping language. *Cf. Penn-*

¹⁵ *See also* statements of participants in the drafting process in Hearings before the Committee on Interstate Commerce on S. 2306 (69th Cong. 1st Sess. 1926) 9-10 (Statement of A.P. Thom), reprinted in II Leg Hist.; *id.* at 21-22 (Statement of Donald Richberg).

sylvania RR v. Day, 360 U.S. 548, 550 (1959) ("The clash of economic forces which led to the passage of the [RLA, and] the history of its enactment . . . guide [its] judicial interpretation.").¹⁶ Second, there can be no doubt that the drafters were familiar with the language of railroad industrial disputes, and would tend to use terms as understood within that industrial community, rather than a more generic sense. See, e.g. *McDermott International Inc. v. Wilander*, 111 S.Ct. 807, 810 (1991). Petitioners' "disjunctive 'or'" argument takes account of neither of these considerations.

Further, petitioners' reading of the statute is not in any way faithful to the maxim from which it is derived. If the term "grievance" is taken broadly to refer to all employment related disputes or complaints, then "grievance" would encompass contract-based disputes as well as others. The statutory language would then still be repetitious, this time with the phrase on the other side of the disjunctive being mere surplusage. On the other hand, to suggest that the term "grievance" does not at least include contract claims would fly in the face of the general understanding of the term, discussed above.

Even if petitioners' first assumption had merit, it in turn rests on the additional assumption that the phrase "disputes over the interpretation or application of agreements," was intended by its drafters to encompass the

¹⁶ This kind of language is common in labor statutes even when the opposing parties do not themselves draft the language. See *Local No. 82, Furniture & Piano Mfg. v. Crowley*, 467 U.S. 526, 541-42 & n.17 ("[M]uch federal labor legislation [is] . . ." the product of conflict and compromise between strongly held and opposed views, and its proper construction requires consideration of its wording against the background of its legislative history and in light of the general objectives Congress sought to achieve."). For example, the National Labor Relations Act, in forbidding secondary boycotts, forbids unions to "threaten, coerce, or restrain any person", where an object is "forcing or requiring" certain persons to do certain acts. § 8(b)(4), 29 U.S.C. § 158(b)(4). It is not immediately evident why "coerce" does not include "threaten" or "restrain" in normal parlance.

entire world of disputes arising out of norms established by the parties, such that the word "grievances," on the other side of the disjunctive, must have been intended to refer to something *other than* such disputes. But it is, at the least, just as likely that the drafters of this provision were concerned that the "interpretation and application" phrase would be construed *not* to include two important classes of disputes now recognized as contractual.

First, the drafters could well have been concerned that "disputes over the interpretation or application of agreements" would be understood to include only disputes over *express* terms of an agreement, and that the term "grievance" was needed to assure that after the RLA was enacted, employees could also bring to the adjustment boards claims based upon implicit understanding grounded in "the parties' 'practice, usage and custom.'" *Conrail*, 491 U.S. at 311, quoting *Transportation Union v. Union Pacific R. Co.*, 385 U.S. 157, 161 (1966). While it is now well understood that the labor agreement "is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate," *Transportation Union*, 385 U.S. at 160-61, quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960), the drafters working in 1926, before the present expansive understanding of the reach of labor agreements was established, could well have taken pains to assure that § 153 First's language was not taken to state the commercial contract rule that the "agreement" is limited to the understandings that have been reduced to express written terms.¹⁷

The drafters might also equally have been concerned that "disputes over the application or interpretation of agreements" would be restrictively read to encompass only claims seeking prospective clarification of the meaning of a contract term, and not to include an individual's

¹⁷ See Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1493-1500 (1959) (developing a theory of the differing treatment of implied contract terms in labor and commercial contracts).

(or group of individuals') retrospective claims that their contractual rights were violated in a specific instance. The latter is the sense of the term grievance that animates the Court's decision in *Chicago River*, 353 U.S. at 33. See also *Union Pacific R. Co. v. Price*, 360 U.S. 601, 613 (1959).

In sum, the likelihood is that the drafters used the terminology they did simply to assure against restrictive interpretations of one or another of the terms used, so as to make clear that *every* kind of dispute grounded in *workplace norms established by the parties*, is subject to the RLA minor dispute resolution procedures.

(iii) Petitioners also mention, as part of their jurisdictional argument, the fact that the 1936 airline amendments to the RLA provided for the transfer of some cases then pending before the National Labor Relations Board to the RLA grievance/arbitration procedure. Pet. Br. 12, citing RLA § 204, 45 U.S.C. § 184. But the 1936 amendments provide only that cases "growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted . . . before the National Labor Relations Board" should be transferred. In other words, *not* all cases pending before the NLRB, but only those meeting the otherwise applicable statutory minor dispute criteria, were to be transferred. While the NLRA provides statutory protections, independent of any contract, against discharges, there is no indication that Congress intended to transfer *those* cases to the RLA adjustment procedure.¹⁸

Indeed, Congress specifically recognized that airline cases pending before the NLRB on the effective date of the 1936 amendments would *not* as a general matter meet the statutory minor disputes criteria, and provided

¹⁸ Certain cases arising under § 8(a)(5), involving unilateral changes by a carrier while a collective bargaining agreement is in place, meet the statutory minor dispute criteria. See, e.g., *NLRB v. C & C Plywood*, 885 U.S. 421 (1967).

otherwise for their disposition. Section 206 of the air carrier amendments provided that:

All cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving *any dispute arising from any cause* between any common carrier by air . . . and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the *Mediation Board*. [Act of April 10, 1936, § 206, 49 Stat. 1191, emphasis added.]¹⁹

In short, there is no basis in the language of the RLA for concluding that Congress intended to route extracontractual common law and statutory causes of action of any kind through the RLA adjustments boards.

C. The language of the statute aside, the "true significance" of the minor dispute resolution provisions of the RLA "must be drawn from [their] context as part of the [RLA] which itself draws its meaning from history." *IAM v. Central Airlines*, 372 U.S. 682 (1963). And the legislative history of the present Act, spanning four different statutes over a forty-year time period, uniformly confirms that Congress intended to confine the RLA "minor disputes" resolution system to controversies arising from or dependent on collective bargaining agreements.

(i) Although federal legislation concerning resolution of railway labor disputes had existed, in one form or

¹⁹ It is hard to see how § 206, providing for the transfer of "any dispute arising from any cause" to the NMB, can be reconciled with the indication in § 204 that *some* disputes should be handled through the grievance/arbitration procedures for minor disputes. This redundancy not only confirms that the RLA generally is characterized by far from precise drafting but, additionally, suggests at least that the categories of NLRB cases expected to come within § 204 were quite limited.

We note as well that there were exactly two cases transferred from the NLRB and that both "were subsequently withdrawn by the petitioners without prejudice to their right to resubmit the cases in accordance with the RLA." See *Second Annual Report of the National Mediation Board* (1936) at 4.

another, since 1888, the "minor disputes" concept had its origin in the Howell-Barkley bill of 1924, supported by the unions but opposed by the railroads.²⁰ That bill provided for the adjudication of "any dispute arising only out of grievances or the application of agreements concerning rates of pay, rules, or working conditions" before mandatory, national adjustment boards. S. 2546, 68th Cong. 1st Sess. (1924), § 4; *see also id.*, §§ 1, 3, 5(B).

In explicating this language, the primary proponent at the Hearings of the statute, Donald Richberg, Counsel for the Organized Railway Employees—who in 1926 was also a key participant in the labor-management negotiations that resulted in the RLA as finally enacted (*see p. 25, infra*)—stated repeatedly and consistently that the term "grievance" is to be given its industrial relations meaning, connoting a dispute growing out of and concerning existing agreements. Mr. Richberg explained at the 1924 Senate Hearings:

[C]ontroversies over [collective bargaining] agreements that threaten the interruption of service arise in two ways and an appropriate machinery is provided [in the bill] for settling peaceably each class of disputes. . . . Now, taking up the grievance disputes . . . disputes over the application of existing agreements, commonly called "grievances." [1924 Hearings at 17-18 (remarks by Donald Richberg, Counsel for the Organized Railway Employees) (emphasis added)].

See also id., at 27 (national adjustment boards will decide "grievances under the application of the agreement" which are "in a large number of instances of a petty character" and involve "[w]hat is good practice under this agreement and what is the fair application of it"); *id.* at 200 ("each and every provision . . . has been put into the bill solely for the purpose of preserving the rights

²⁰ The 1924 bill is particularly pertinent in construing the present Act as amended, because its provision for a national mandatory adjustment board was adopted in the 1934 amendments. 45 U.S.C. § 153.

of employees to honest representation in making agreements and honest enforcement of the terms of the agreements"); *id.* at 202 ("Now, coming to the question of adjustment of grievances when a dispute arises over the application of an agreement"); *id.* at 203.

(ii) With slight changes (principally, replacing "application of agreements" with "interpretation or application of agreements"), the language of the 1924 bill describing minor disputes was used again for similar purposes in sections 2, Fourth and 3, First of the 1926 version of the Railway Labor Act. 1 *Leg. Hist.* at 4-5. The references to the minor disputes provisions in the 1926 committee reports basically repeat the statutory language. H.R. Rep. No. 328, 69th Cong. 1st Sess.; 1 *Leg. Hist.* at 3; S. Rep. No. 606, 69th Cong. 1st Sess.; 1 *Leg. Hist.* at 100-01. But the comments made on the floor by proponents of the bill are more informative and make clear that the "grievances" covered by the statutory command to arbitrate were *not any and all employee-employer disputes*, but only those growing out of the norms stated or otherwise incorporated in the labor agreements negotiated under the Act.

For example, Representative Barkley, a leading proponent of the bill and a member of the Committee that reported it, twice explained that, in railroad parlance, incorporated in the bill, a "grievance" is a variety of contractual dispute:

There are two sorts of disputes that arise on railroads. One kind is a dispute growing out of the interpretation of agreements as to wage scales or working conditions that already exist. *These disputes might be termed grievances*; they might affect a large number of men in some way and they might affect only a small number of men, or they might affect a single individual. . . . [The adjustment boards established during government operation of the railroads, after which the RLA boards were modeled] were to settle *grievances of every kind and character growing out of disputes that arose over the interpretation of*

existing agreements as to scales of wages and conditions of service. [1 Leg. Hist. at 192 (remarks of Rep. Barkley, 69th Cong., 1st Sess., Feb. 24, 1926) (emphasis added).]

As Representative Barkley later added:

You see, there are two types of disputes recognized on railroads. One is the interpretation of agreements already in existence, applying to discipline and small grievances that may not only come up with reference to groups of men but may arise with reference to a single man. These are all technical. They have nothing to do with wages received, but they have to do with the technical interpretation of agreements that exist and the exercise of discipline between the management and employees. [*Id.*, at 205.]

The explanation offered on the Senate side by Senator Watson, the Chairman of the reporting committee, was similar. Beginning, as had Representative Barkley, with an historical survey covering the period of governmental operation of the railroads, Senator Watson stated:

During that period many cases were referred to these boards of adjustment; but the boards of adjustment in that case, as in this bill provided, had to do only with *grievances—that is to say, with the interpretation and the application of existing agreements as to wages, hours of labor, and conditions of service . . .* The problems are all of a technical nature and therefore railroad men are required to decide them. So that . . . in the measure before us, *we provide for boards of adjustment to settle those technical questions that arise growing out of the interpretation and the application of existing agreements as to wages, hours of labor, and conditions of service . . .* [Leg. Hist. at 480 (Remarks of Sen. Watson, 69th Cong., 1st Sess., May 6, 1926) (emphasis added).]²¹

²¹ Without quoting the statements directly in point which we have reproduced in the text, petitioners rely primarily upon two other statements, also by Representative Barkley and Senator Watson, as demonstrating an intent to provide for mandatory arbitration of extracontractual disputes. See Pet. Br. at 15-16.

From these explanations, it appears that the language of the minor disputes provisions of the RLA was chosen to make absolutely clear that all varieties of contractual disputes—those arising from the complaints of individuals or groups of individuals, as well as those precipitated by union-management discussions or disputes, regarding the

Particularly when read in conjunction with the other, unambiguous remarks by the same individuals we have quoted, the statements quoted in petitioners' brief are entirely consistent with our position on the question. Thus, the entire paragraph by Senator Watson relied upon by petitioners reads:

Let me say, Senators—and this is essential in the consideration of the question—that there are two classes of disputes that arise in connection with the operation of railroads. One class is what are ordinarily called grievances. They may be of a personal nature; they may involve a great many employees; they may involve a few employees; they may involve but one employee. *Of this class, also*, are disputes arising out of the interpretation and application of existing agreements as to wages, hours of labor, or working conditions. [1 Leg. Hist. at 477 (remarks of Sen. Watson, 69th Cong., 1st Sess., May 6, 1926, (emphasis added).]

Since Senator Watson treated as part of the class "ordinarily called grievances" those disputes arising out of the interpretation and application of agreements, his statement *supports* our understanding that the term "grievances" does not exclude, as an entirely different class of disputes, contractual controversies.

Rep. Barkley's statement that adjustment boards will discuss "disagreements over grievances, interpretations, discipline, and other technicalities that arise from time to time in the workshop and out on the tracks" appears to be simply an indistinct summary of the same Representative's more precise remarks quoted in our text. That statement surely does not support petitioners' position, since it indicates that a "grievance" is *not* a "disagreement[] . . . over discipline."

Of the two other remarks petitioners present in support of their position (Pet. Br. at 9 n.8), the one by Rep. Arentz (referring to "grievances, discipline and disputes over the application and meaning of an agreement") for the same reason does not support the petitioners' position. And the statement by Rep. Crosser—that the adjustment board serves "to determine who is right and who is wrong, what is just and what is unjust"—is entirely too general and vague to throw any light at all upon whether those judgments are to be made with reference to an existing agreement or otherwise.

contract—were to be covered. There was no intent, however, to reach beyond contract-related matters.

This conclusion is decisively confirmed by the legislative history of the 1934 amendments to the Act. Those amendments entirely revised the minor disputes provisions of the Act, establishing a mandatory rather than voluntary adjustment board. 48 Stat. 1185, Pub. L. 73-442 (1934); see *1 Leg. Hist.* at 820 (S. Rep. No. 1065, 73rd Cong., 2d Sess. (1934)); *id.* at 918 (H.R. Rep. No. 1044, 73rd Cong., 2d Sess. (1934)). The jurisdiction of the new adjustment procedures was described with the same language used previously—"disputes . . . growing out of grievances or out of the interpretation and application of agreements." Section 3, First, (i), 45 U.S.C. § 153, First (i). This time the House Committee Report made it clear that the term "grievances" is not used to designate a group of disputes distinct from contractual disputes; rather, the new National Railroad Adjustment Board was described as having authority over

minor disputes known as "grievances," which develop from the interpretation and/or application of the contracts between the labor unions and the carriers. [H. Rep. No. 1044, 73rd Cong. 2d Sess. (1934), reprinted in *1 Leg. Hist.* at 919-920.]

Finally, the Congresses that amended the Act in other ways in later years also plainly acted on the understanding that the realm of adjustment board activity is limited to contractual disputes. For example, when, in 1936, the Act was amended to cover the newly developing airlines, the decision was made to delay establishing an adjustment board for the airlines. The explanation offered for the delay was as follows:

This [National Air Transport Adjustment Board] will be created and will function in the same manner as the railway board, excepting that it need not be established immediately . . . The reason for this permissive delay in its formation is that *there is nothing for such a board to do until employment contracts have been completed*, and there are no such

contracts in operation now. [*1 Leg. Hist.* at 1050 (H.R. Rep. No. 2243, 74th Cong. 2d Sess. (1936) (emphasis supplied)).]

And the 1966 Congress, which once again revised the minor dispute provisions, expressed repeatedly the understanding that those provisions applied to matters of contract interpretation. See H.R. Rep. No. 1114, 89th Cong., 1st Sess. (1965), *1 Leg. Hist.* at 1309 (the minor disputes mechanisms apply to "grievances arising under collective bargaining agreements"); *id.* at 1352 (remarks of Representative Staggers, 89th Cong., 2d Sess., Feb. 9, 1966); *id.* at 1363 (remarks of Representative Thompson); *id.* at 1371 (remarks of Representative Horton).

(iii) We believe this history, fairly construed, supports the entirely commonsense understanding that "grievance" was intended to denote a particular kind of dispute based upon workplace norms developed by the parties themselves. The treatment of claims that the RLA *itself* has been violated lend further support to this view: The RLA assigns to the courts, not to the adjustment boards, the RLA *statutory* cause of action for retaliatory discharges, on the basis of union activity, indicating an understanding that such non-contractual causes of action are *not* "grievances." See, e.g., *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974); *Adams v. Federal Express Co.*, 654 F.2d 452 (6th Cir. 1981). See generally *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 545-553 (1937).

In contrast, petitioners' submissions to the contrary notwithstanding, there is nothing in the Federal Railway Safety Act ("FRSA"), 45 U.S.C. §§ 421-447, or its history indicating that Congress intended *all* retaliatory discharge cases to be adjudicated according to the RLA's minor dispute provision, even when based on extracontractual statutory or common law. The FRSA amendments of 1980 extended, to railroad employees only, protection against retaliatory discharge based on reporting statutory violations or refusal to work for safety reasons. Any claims arising under either provision were made

"subject to resolution" by the RLA adjustment board procedures. 45 U.S.C. § 441(c)(1).

Petitioners claim that Congress' decision to assign adjudication of this particular statutory retaliatory discharge causes of action to the RLA adjustment board processes demonstrates an intention that *all* noncontractual wrongful termination cases be decided through those processes. Even if the actions of a much-later Congress were in any way pertinent, the logical interference would be quite the opposite: If Congress thought that all such causes of action were already subject to the RLA adjustment board procedures, there would have been no reason to single out these particular causes of action for adjustment board coverage by explicitly so stating.

Moreover, the very section upon which petitioners rely for a contrary inference explicitly reserves to railroad employees the option of pursuing, outside of the RLA minor dispute procedures, claims based upon conduct violative of the FRSA and of another provision of law. Section § 441(d) provides:

Whenever any employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law.

If, as petitioners argue, Congress intended § 441 "simply to codify the existing system" under the RLA (Pet. Brief at 12), then the codification of an employee's right to an election of remedies in § 441(d) demonstrates that the pre-existing RLA system did *not* limit "whistleblowers" relying on a non-RLA "provision of law" exclusively to the RLA grievance/arbitration procedure.

D. The adjustment boards charged with administration of the minor disputes provisions of the RLA, and the National Railroad Adjustment Board ("NRAB"), particularly, have uniformly understood those provisions as pertaining only to disputes invoking contract-based rights.

Thus, the NRAB has repeatedly and, so far as we can ascertain, consistently rejected cases that were not based on labor agreements, or sought to adjudicate extra-contractual causes of action. *See, e.g.,* NRAB Fourth Div. Award No. 4548 (1987) ("The function of this Board is limited to deciding disputes in accordance with the provisions of a controlling Labor Agreement as applied to the facts and evidence in the record."); NRAB Third Div. Award No. 24348 (1983) ("The two issues raised by the Petitioner are not related to the interpretation or application of contracts and thus are outside our authority."); Third Div. Award No. 21926 (1978) ("An individual's . . . allegation that Agreements are illegal . . . without even a hint that the Agreement is not being properly applied, clearly constitutes a case over which the Board lacks jurisdiction."); NRAB Second Div. Award No. 6462 (1973) ("This Board is not empowered to interpret the laws of Congress."); NRAB Third Div. Award No. 20048 (1973) (The Board's jurisdiction is by statute limited to interpretation and applying the terms of in being collective bargaining agreements. . . . We do not have judicial power to find an action or course of conduct 'illegal.'"); NRAB Third Div. Award No. 19790 (1973) ("this Board lacks jurisdiction to enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreement.").²²

Airline system board cases reach the same conclusion. *See Northwest Airlines/Airline Pilots Association, Inter-*

²² *See also, e.g.,* NRAB Second Div. Award No. 11768 (1994); Second Div. Award No. 11768 (1989); First Div. Award No. 23909 (1989); Fourth Div. Award No. 4674 (1989); Third Div. Award No. 27650 (1988); Fourth Div. Award No. 4500 (1986); Third Div. Award No. 25554 (1985); Second Div. Award No. 9405 (1983); Third Div. Award No. 24348 (1983); Third Div. Award No. 22707 (1980); Third Div. Award No. 22318 (1979); Second Div. Award No. 8131 (1979); Third Div. Award No. 20565 (1974); Third Div. Award No. 19950 (1973); Fourth Div. Award No. 2967 (1973); Third Div. Award No. 18352 (1970); Third Div. Award No. 18123 (1970); First Div. Award No. 21459 (1968).

national System Board of Adjustment, Decision of June 28, 1972, at 13; *United Airlines, Inc.*, 48 LA 727 (BNA) (1967) ("The jurisdiction of this system board does not extend to interpreting and applying the Civil Right Act.").²³

As this Court has recognized, such "uniform administrative interpretation" by the NRAB is of particularly "great importance" under the RLA, "reflecting, as it does, the needs and fair expectations of the railroad [and airline] industr[ies] for which Congress has provided what might be termed a charter for its internal government." *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548, 552 (1959).

E. The foregoing should be more than sufficient to establish that Congress did not intend to direct employment-related causes of action based upon legal principles external to the applicable collective bargaining agreement to the dispute adjustment procedure mandated by the RLA. Moreover this is a case in which any such intent would have to be established with unusual clarity, both because of the usual presumption against federal displacement of state law (*see pp. 8-10, supra*), and to avoid constitutional problems as well.

Petitioners' jurisdictional preemption argument—that Congress' intent was to require that even state common law, extracontractual causes of action be adjudicated be-

²³ The National Mediation Board as well has always considered the Adjustment Board's jurisdiction limited to contract-based claims. *See National Mediation Board, First Annual Report* (1935), at 5 (RLA contracts "establish property rights for the individual employees which are enforceable through adjudication by the National Railroad Adjustment Board." *See also Second Annual Report* (1936) at 3 (NRAB functions "to interpret agreements or to settle finally grievances of employees arising thereunder"); *Fourth Annual Report* (1938) (adjustment boards resolve "all disputes growing out of questions, claims, or grievances involving the terms of these labor agreements."); *Thirty-first Annual Report* (1965) ("in the application of . . . agreements to specific factual situations, disputes frequently arise as to the meaning and intent of the agreement. These are called minor disputes.").

fore RLA adjustment boards—runs afoul of a principle of statutory interpretation even stronger than the presumption against federal preemption:

[W]here an otherwise acceptable construction of a statute could raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to the intent of Congress. [*DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (citing cases).]

In this instance, petitioners' jurisdictional preemption argument, if adopted, would raise serious Seventh Amendment (and possibly Article III) problems.²⁴ For petitioners would relegate to a nonjudicial federal forum, without a jury, state common law causes of action, such as this one, with no substantive connection to the RLA or to the collective bargaining relationship that the RLA was enacted to foster and regulate.

Seventh Amendment analysis requires first, the determination of whether or not a statutory cause of action is sufficiently "analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those heard by courts of equity or admiralty." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989); *see also Teamsters Local 391 v. Terry*, 110 S. Ct. 1339, 1345-47 (1990). This case, however, involves a common law tort, albeit one recently recognized, and the relief sought—compensatory and punitive

²⁴ The Seventh Amendment provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall not be denied." U.S. Const., amend. VII.

The Seventh Amendment concerns were not raised below as an aid to construing the RLA. Parties are not, however, confined here to the same arguments which were advanced in the court below upon a federal question there discussed. *Illinois v. Gates*, 462 U.S. 213, 219-220 (1983); *Yee v. Escondido*, 112 S. Ct. 1522, 1532 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

damages—is clearly legal rather than equitable in nature. *Granfinanciera*, 492 U.S. at 42. Thus, the only significant question as to the applicability of the Seventh Amendment is whether “Congress may assign . . . resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a factfinder.” *Id.* at 42.

As a general matter, this Court’s cases do not permit assigning to a non-Article III, nonjury adjudicative body “[w]holly private tort, contract, and property cases.” *Granfinanciera*, 492 U.S. at 51; *see also id.* at 51-52 (Congress “lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.”). For both Seventh Amendment and Article III purposes, the test of whether a cause of action as to which the Federal Government is not a party involves “public” rather than “wholly private” rights is

whether “Congress, acting for a valid legislative purpose pursuant to its constitutional powers . . . [has] created a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” [*Granfinanciera*, 492 U.S. at 54, quoting *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 593-94 (1985).]

RLA collective-bargaining agreement-based causes of action meet the “public rights”/“closely integrated” test, since the statute as a whole is directed toward encouraging the formation and enforcement of those agreements. That is why, presumably, this Court rejected, *sub silentio*, Seventh Amendment arguments raised by the parties in at least one RLA minor dispute contract-based case. *See, e.g., Pennsylvania R.R. v. Day*, 360 U.S. at 560-562 (Black, J., dissenting). But it is all but impossible to see why causes of action such as the one here with *no* contractual grounding are in any way substantively connected to the regulatory scheme of the RLA. At the least, the contention that a cause of action such as Norris’ is a purely “private right” for Seventh Amend-

ment purposes is a substantial one, and petitioners’ preemption argument, untenable to begin with, should be rejected for that reason as well.

F. Notwithstanding these compelling precedential, statutory, historical, administrative and constitutional considerations, petitioners and their *amici* insist that in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945), *aff’d on rehearing*, 327 U.S. 661 (1946), this Court *has* determined that extracontractual claims brought by employees covered by the RLA arising out of their employment are subject to the exclusive jurisdiction of the RLA adjustment boards. In fact, *Burley* did not decide any issue pertinent to this case.

(i) Petitioners rely on the following language in *Burley* defining an RLA minor dispute as one that

relates either to the meaning or proper application of a *particular provision* [of a collective agreement] with reference to a specific situation or to an omitted case. In the latter event, the claim is founded upon some incident of the employment relation or asserted one, independent of those covered by the collective agreement, *e.g.*, claims on account of personal injuries. [325 U.S. at 723 (emphasis added).]

For a myriad of reasons, that single sentence in *Burley* is much too thin a reed to support petitioners’ jurisdictional preemption argument.

The *Burley* statement is *dicta* by a narrowly divided Court; the claims actually at issue in *Burley* were in fact *contract* claims.²⁵ And, the meaning of the *dicta* is far

²⁵ The issue *decided* in *Burley* was whether an individual employee can bring a contract-based discharge cause of action in court if the union has settled the very same contract contention on behalf of the same member within the RLA grievance-arbitration procedure. A closely divided Court ruled that a union has no authority to settle grievances unless the union can show “in some legally sufficient way [the individual employee] has authorized it to act in his behalf.” 325 U.S. at 738.

As a result of the broad reach of the decision, the United States, the railroad, the union and many other *amici* successfully petitioned

from clear. The word "omitted" in the *Burley* passage is most logically read as a reference to a norm that the parties have created but have omitted from the labor agreement's *explicit* language while meaning to incorporate it within the agreement as an implicit term. Conversely, the term "omitted" does not suggest a norm imposed by the courts or the legislature, rather than by the parties to the labor agreement. See *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 154-155 (1969) (emphasis added) ("It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often *omitted* from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others."); see also *Conrail*, 491 U.S. at 311, quoting *Transportation Union v. Union Pacific R. Co.*, 385 U.S. 157, 161 (1966). For all it appears, then, the Court

for rehearing. The Court was informed in the petitions that the majority opinion was based on a misunderstanding of the way in which industrial disputes are determined so fundamental as to have resulted in "the shutting down of the Adjustment Board," because the opinion's express authority requirement was almost never met. 327 U.S. at 668-669 (Frankfurter, J., dissenting).

On rehearing, the Court affirmed its decision in form, but in fact greatly narrowed its reach, holding that normal laws of agency do not apply, and that there is a presumption that employees are aware of the way their union is settling their claim. 327 U.S. at 665-666. See also *id.* at 668 (dissenting) ("the Court 'adheres' . . . to [its previous decision] by extracting from it almost all of its vitality [A union member's] prospects . . . are largely illusory because the Court now erects a series of hurdles which will be, and we assume were intended to be, almost impossible for an employee to clear.").

That *Burley* was reheard is pertinent here for two reasons: First, the *dicta* relied on here was *not* repeated in the rehearing opinion. Second, that opinion is an implicit recognition that the original opinion was based on some basic misconceptions concerning the world of railroad and airline industrial relations—including, we maintain, misconceptions concerning the nature of collective bargaining agreements and the reach of nonjudicial dispute resolution processes within that world.

was referring only to claims based on *implied* contract terms, and not, as petitioners would have it, to claims based on independent sources of law.

Further, while the section in *Burley* including the "omitted case" language has oft been quoted, it has *never* been *followed* by this Court to grant RLA adjustment boards jurisdiction over extracontractual public law causes of action. See, e.g., *Conrail*, 491 U.S. at 305. Instead the cases in which the broad *Burley dicta* is quoted are contract-based cases. At the same time, as recounted in Part I, *supra*, in every case in which the *dicta* might have been applicable, the Court has ruled that the RLA adjustment boards are *not* the forum in which to adjudicate state law minimum labor standards. Most tellingly in *Buell*, this Court necessarily rejected as outside the adjustment boards' jurisdiction the one *specific* example of an "omitted case" that *Burley* gave—suits for personal injury that do not rest on a contractual base.

Finally, *Burley* was based on the understanding that the grievance-arbitration procedures provided for in the RLA are optional, rather than exclusive, even for contract-based claims. Therefore, reading the *dicta* for all it is worth suggests only that the adjustment boards *also* have jurisdiction over some class of extracontractual claims, *not* that those claims must be brought exclusively before Adjustment Boards. As Professor Feller has explained,

Burley . . . confirmed with emphasis the assumption in *Moore* [*v. Illinois Cent. R. Co.*, 312 U.S. 630 (1941),] that a collective agreement constituted a contract enforceable by individual employees without regard to the procedures of the Adjustment Board.²⁶

²⁶ *Moore* held that "neither the original 1925 Act, nor the Act as amended in 1934, . . . provided for settling disputes based on legal compulsion". 312 U.S. at 635. *Moore* based this conclusion on the fact that 45 U.S.C. § 153, *First* (i), the section directing minor dis-

[T]he Court held that in the absence of a showing that the employees had authorized the union to act for them . . . [the Adjustment Board's] result did not bind them. Neither the majority nor the dissenters even raised the question . . . whether the plaintiffs had any business in court at all [Rather] [b]oth sides assumed that . . . the claims themselves, assuming them to be unsettled, were adjudicable in the courts rather than before the Board. [Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev., 663, 680-81 (1971).]

Given the permissive system that *Moore* and *Burley* posited, the assumption that the RLA allowed—but did not require—arbitration of *all* employer-employee disputes would have had no impact upon the right of individual employees to pursue individual rights claims in court.

During that same period, however, the Court in a series of cases decisively moved away from the *Moore-Burley* voluntary arbitration doctrine where rights created by the collective bargaining agreement *are* at the core of the dispute. See generally Feller, *A General Theory of the Collective Bargaining Agreement*, *supra*, at 682-686; 692-700. In those cases, as the Court came to understand that the adjustment board's jurisdiction over minor disputes was *exclusive*, the Court has consistently recognized as well that those disputes over which the board has exclusive jurisdiction are fundamentally contractual. See *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 565 (1946) (finding exclusive Board jurisdiction when "the dispute involved was contractual in nature"). See also *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 242 (1950) (characterizing the RLA dispute resolution mechanisms as covering "disputes concerning the making of agreements and . . . grievances arising under existing agreements") (emphasis supplied); *id.* at 243 (the board has jurisdiction over "employee disputes growing out of

putes to the NRAB, says that such disputes "may", not "shall" be so directed. *Id.*

the interpretation of existing agreements") (emphasis supplied).

When, in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), the Court finally overruled *Moore* and held that the RLA adjustment boards were the exclusive forum in which to challenge breaches of RLA labor agreements, the Court also made absolutely clear that the board's exclusive jurisdiction is limited to claims alleging breach of the labor agreement:

[Petitioner's] claim against his employer [is] a dispute as to the interpretation of a collective bargaining agreement. His claim is *therefore* subject to the Act's requirement that it be submitted to the Board for adjustment."

406 U.S. at 324 (emphasis added); see also pp. 44-47, *infra*.²⁷

²⁷ See also *Conrail*, 491 U.S. at 305 ("[t]he distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement"); *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 261-62 (1965); *Union Pacific Ry. Co. v. Price*, 360 U.S. 601, 609 (1959) ("grievances arising from the application of collective bargaining agreements to particular situations"); *Pennsylvania RR Co. v. Day*, 360 U.S. at 551-53 ("Congress [entrusted] an expert administrative board with the interpretation of collective bargaining agreements"); *Brotherhood of RR Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. at 38 (quoting legislative history indicating that the railroad unions agreed to support the RLA on the understanding that "in respect to these minor-grievance cases that grow out of the interpretation and/or application of the contracts already made . . . they can very well permit those disputes to be decided . . . by an adjustment board"); *Brotherhood of RR Trainmen v. Howard*, 343 U.S. 768, 774 (1952) (permitting under the RLA itself a judicial remedy to enforce the right of black employees not to be discriminated against on the basis of race because "[t]he claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board").

III. THE LINGLE DECISION PROVIDES THE APPROPRIATE ANALOGY FOR THE RULE OF DECISION IN THIS CASE.

The remaining questions, then, are two: First, what standard does apply in determining whether a particular cause of action is sufficiently rooted in the collective bargaining agreement to be within the exclusive jurisdiction of the RLA adjustments boards? And second, is Norris' Hawaii common law retaliatory discharge claim within or without the jurisdiction of the RLA minor dispute resolution system under that standard?

A. This Court has, under the NLRA, decided a case virtually identical to this one with regard to the connection between the asserted cause of action and the applicable NLRA labor agreement. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988), like this case, involved an employee covered by a labor agreement who alleged she was discharged from her employment in violation of the state common law of wrongful discharge. In both cases, the employee's factual allegations, if true, might well have been sufficient to show a violation of the applicable agreement, which in both cases made arbitration the exclusive remedy for claimed breaches of the agreement. And, in both cases, the employee initially invoked the contractual grievance procedure, and thereafter filed a common law wrongful discharge suit in state court. The only relevant difference between the two cases is that Jonna Lingle was working in an industry covered by the NLRA, while Grant Norris was an airline employee subject to the RLA.

Petitioners maintain that distinction is of sufficient moment that, even if their broad argument sweeping all employment-related disputes into the RLA minor dispute resolution system is rejected (as it must be, for reasons already stated), *Lingle* and its NLRA predecessors are not pertinent analogies in determining the preemption question. In particular, petitioners suggest that, while *Lingle* would not preclude state law litigation where there is only factual parallelism between the state cause of action and a

breach of the labor agreement claim that could have been made, the RLA should preclude state law suits as to which a contract-based claim might provide an alternative remedy, albeit not the one the employee has chosen to pursue. As we now show, however, the RLA exclusive jurisdiction doctrine for contract-based claims parallels the NLRA cases and principles, and every consideration points toward a common preemption rule covering both statutes.

(i) Preemption under LMRA § 301, a 1947 amendment to the NLRA, functions to assure that issues of NLRA contract interpretation are resolved through one body of federal common law, and, in particular, that if the parties to an NLRA labor agreement choose to have contract disputes resolved through arbitration, they are assured the benefit of that bargain.²⁸ As the Court explained in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 209 (1985), this preemption doctrine follows from *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), where "the Court ruled that § 301 expresses a federal policy that the substantive law to apply in § 301 cases 'is federal law, which the courts must fashion from the policy of our national labor laws.'" *Lueck*, 471 U.S. at 209, quoting *Lincoln Mills*, 353 U.S. at 456.

In *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962), the Court resolved the "choice of law" question inherent in *Lincoln Mills*, by ruling that these federal common law principles must apply in all NLRA breach of labor contract cases, whether brought in state or in federal court. Thus, the Court declared federal contract law paramount, and state contract law preempted, when courts are presented with labor contract claims.

Finally, in a series of cases starting with *Lueck*, and including *Lingle*, the Court considered the extent to

²⁸ See Brief for the AFL-CIO As Amicus Curiae In Support of Petitioner in No. 92-1920, *Livadas v. Aubry*, pp. 4-25, for a more detailed argument of the development and purpose of LMRA § 301 preemption.

which § 301 preempts state law claims that are styled as something *other* than a breach of contract claim. Collectively, these cases establish that if the parties to a labor agreement bargain for arbitration of breach of contract claims, that bargain is to be respected regardless of the label that a plaintiff may attach to a claim that *in essence* alleges a breach of the labor agreement. *See, e.g., Lueck*, 471 U.S. at 211. Very simply stated, a state law claim that states in substance that the defendant-employer denied the plaintiff-employee covered by a collective bargaining agreement a *contract right* does nothing more than give force to the applicable labor agreement, and so is a contract claim preempted by § 301. *Id.*

On the other hand, the § 301 preemption law recognizes that if a plaintiff's claim is grounded upon a substantive state labor standards right, the claim is *not* preempted by § 301. This is true even though the plaintiff *could* have sought remedies for the same injury under the labor agreement. *Lingle*, 486 U.S. at 408-410. And it is true even though resolution of the state law claim may require tangential references to a labor agreement, most particularly when an employer asserts the agreement as a *defense* to the claim. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987) ("a plaintiff covered by a collective bargaining agreement is permitted to assert [in state court] legal rights *independent* of that agreement") (emphasis in original).

When such contract questions arise in the course of resolving an independent state law claim, § 301 requires that "federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted." *Lingle*, 486 U.S. at 413 n.12. Any broader understanding of § 301 preemption, the Court has stressed repeatedly, would have the improper result of depriving unionized workers of the benefits of independent state worker protective laws, a consequence that cannot be squared with the limited role of § 301 preemption in the NLRA-LMRA scheme, or with the over-all purposes of federal labor legislation, which was

to improve the lot of workers, and not to deprive them of rights otherwise available to workers generally. *Metropolitan Life*, 471 U.S. at 754.

(ii) The RLA contract-based preemption doctrine from its inception has exactly paralleled in development and scope the LMRA doctrine. Thus the doctrine originated from this Court's decision in *IAM v. Central Airlines*, *supra*, where the Court determined that "the [RLA] § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts." 372 U.S. at 692. A federal law of RLA contract was necessary to insure that RLA contracts be subject to uniform interpretation:

If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States The needs of the subject matter manifestly call for uniformity. Compare *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962). [372 U.S. at 691-692.]

In identifying the source of the preemptive reach of the RLA arbitration provision, the *Central Airlines* Court did not, as petitioners would have it, look to policies or language unique to the RLA arbitration scheme, nor did the Court suggest that it was attempting to "keep employment disputes in the transportation industry out of the courts." Pet. Br. 41. Instead, *Central Airlines* explicitly adopted the doctrine previously developed under LMRA § 301. Indeed, as just noted, *Lucas Flour* is the decision that was to become the principal foundation for the § 301 preemption doctrine developed in *Lueck* and *Lingle*. And the very pages of *Lucas Flour* cited by the Court in *Central Airlines* were in turn excerpted at length in *Lueck* and again in *Lingle* to explain the principle of uniformity of contract interpretation that animated the Court's subsequent preemption holdings. *Lueck*, 471 U.S. at 210; *Lingle*, 486 U.S. at 404 & n. 3. *Central Airlines*, then, adopted for the RLA the *Lincoln Mills/Lucas Flour* understanding of the LMRA § 301.

(iii) *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), built on the holding of *Central Airlines* in exactly the same manner that *Lueck* built on *Lucas Flour* in considering the preemptive effect of the RLA on claims that are not pleaded as breach of contract claims, but are nevertheless grounded on contract rights. Because we agree with petitioners that "*Andrews* goes quite far toward resolving the issues before the Court on the instant petition, (Pet. Br. at 28)—albeit the resolution *Andrews* supports is the opposite of the one which petitioners propound—we consider that decision in some detail.

As noted (pp. 38-39, *supra*), *Andrews* overruled *Moore* and held that the RLA adjustment boards are always the exclusive fora in which to challenge breaches of RLA labor agreements. The central issue between the parties in *Andrews* was not, however, whether *Moore* should still govern in all claims alleging breach of contract under the labor agreements. Both sides recognized that *Moore* had already been overruled in all but name. Rather, the question dividing the parties was whether *Andrews* was or was not a contract-based case.

Thus, the plaintiff employee in *Andrews* claimed that his case was not really a breach of labor contract case at all, and therefore adjudicable in the courts:

This controversy does not involve a "labor dispute" as that term is commonly understood; it does not involve the interpretation of a collective bargaining agreement or concern the wages or rates of pay or vacation or retirement or pension or seniority rights or working conditions of any class or group of employees. [*Andrews*, Brief for Petitioner at 5 (emphasis in original)].

And the defendant employer in *Andrews* countered with the insistence that the Georgia wrongful discharge tort "is nothing more than a suit for breach of an employment contract (for absent the contract there are no rights at law of course)." *Andrews*, Brief for Respondent at 9. So understood, the employer further argued, the case pro-

vided the vehicle to overrule *Moore* in light of the NLRA decision in *Maddox*, "making the rights of workers in the railroad industry comparable to those of workers who have collective bargaining agreements within the sphere of the Labor Management Relations Act." *Id.*, 6, 9. See also *id.* at 32-33, 41-42, 51.

The *Andrews* Court understood that its decision turned on the proper characterization of the claim before it:

[T]he very concept of "wrongful discharge" implies some sort of *statutory or contractual* standard that modifies the traditional common law rule that a contract of employment is terminable by either party at will. *Here it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as "wrongful," is the collective bargaining agreement between the employer and the union. . . . The existence and extent of such an obligation in a case such as this will depend on the interpretation of the collective bargaining agreement. Thus petitioner's claim, and respondent's disallowance of it, stem from differing interpretations of the collective-bargaining agreement. . . . His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment.* [406 U.S. at 323-24 (emphasis supplied).]

This conclusion triggered a vigorous dissent focussing not on the ruling that contract claims should be resolved exclusively through the NRAB, but on the majority's conclusion that *Andrews*' claim was a contract claim. See 406 U.S. at 327 (Douglas, J., dissenting) ("no issue involving the collective bargaining agreement is tendered"); *id.* at 331 ("This is a plain, ordinary, common-law suit not dependent on any term or provision of a collective-bargaining agreement").

In deciding the case, then, the *Andrews* Court adopted the employer's argument in *both* respects: that the same preemption rules should apply under the RLA as under LMRA § 301, and that applying those rules to the facts before it, *Andrews*' claim sounded in contract and had to

be resolved through the adjustment board. Accordingly, *Andrews* relied squarely upon the doctrine established under the NLRA/LMRA scheme:

In *International Association of Machinists v. Central Airlines*, [*supra*], an agreement required under § 204 of the Railway Labor Act was said to be "like the Labor Management Relations Act § 301 contract . . . a federal contract and . . . therefore governed and enforceable by federal law, in federal courts." 372 U.S. at 692. A similar resolution was reached under § 301(a) of the Labor Management Relations Act in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

In *Republic Steel v. Maddox*, 379 U.S. 650 (1965), the Court deduced from the Labor Management Relations Act a preference for the settlement of disputes in accordance with contractually agreed upon arbitration procedures. . . . Since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems . . . from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA. [406 U.S. at 323.]

These are, of course, the same decisions that the Court relied upon in *Lueck*. In the *Andrews* Court's view, the argument for applying these same § 301 principles in the RLA context was "if anything even stronger" than in the LMRA context, because contract arbitration existed by operation of statute under the RLA. But nothing in the *Andrews* opinion suggests any basis for adopting *different* contract-preclusion principles under the RLA than under § 301.

To the contrary, in rejecting the employee's contention that he was seeking to assert a tort claim, and not a contract claim, *Andrews* adopted essentially the same "contract dependency" rule for RLA preemption that was later adopted, using remarkably similarly language, in *Lueck*, *Lingle*, and in their progeny for LMRA § 301

preemption: Only *because* the *Andrews* Court determined that the claim was in its essence a contract claim did the Court rule that the claim must be resolved through an adjustment board. Compare *Andrews*, 406 U.S. at 323-24, with *Lueck*, 471 U.S. at 211-217; *Lingle*, 486 U.S. at 405.

In sum, contrary to petitioners' belief, *Andrews* provides the strongest of support for the Hawaii Supreme Court decision here, which engaged in precisely the same analysis that the Court undertook in *Andrews*. Pet. App. 13a & n.10. See also *Puchert v. Apsalud*, 67 Haw. 25, 677 P.2d 449 (1984), appeal dismissed for want of substantial federal question, 472 U.S. 1001 (1985).

(iv) Petitioners nevertheless argue that a greater or different kind of uniformity is mandated by the RLA than required by LMRA § 301, because the RLA's arbitration scheme is mandatory, while "arbitration under the LMRA is a matter of contractual undertaking between the parties and is purely voluntary." Pet. Br. 40. But there is no reason why a scheme that mandates arbitration of contractual disputes and a scheme that encourages voluntary arbitration of such disputes require preemption of different *kinds* of claims. The purpose of the preemption in both cases is the same: to assure that when a claim is subject to arbitration, the courts will require that it be resolved in that manner. For that reason, presumably, *Andrews* applied a standard precisely parallel to *Lueck* and *Lingle* in determining whether or not the cause of action before it was contract-based, and therefore preempted.²⁹

²⁹ Petitioners also argue that LMRA and RLA arbitration differ in that the former is solely a creation of the union and the employer, with the employee not even having a right of access to the arbitral forum, while the latter is by design better suited to adjudicate individual rights. Pet. Br. 41-42. But from the point of view of the individual asserting a statutory right, both systems suffer nearly identical deficiencies: Under both Acts the arbitration system is controlled by the union and the employer, and the employee has no input into crucial aspects of the process. Most of all, the individual

It is simply not possible to identify "a much broader [legislative] purpose in enacting the RLA" than that to be found in the NLRA *with regard to the role of contract-based claims in the arbitration system*. Pet. Br. 41. For, although there are important differences, the two statutes are fundamenally similar in that regard: Both provide a federal process for reaching agreements covering terms and conditions of employment, but do not seek to impose any substantive terms on the parties to such agreements. And both provide a federal mechanism for resolving disputes over the application of those federal agreements. That being so, it is unsurprising that preemptive doctrines designed to protect both the collective bargaining and dispute resolution mechanisms of the two Acts have developed along parallel lines, and result in the same governing standards.

B. Petitioners argue alternatively that even if *Lingle* does provide the appropriate analogy for this case, respondent's claim nevertheless should still be preempted because in two respects that claim differs from that of the employee in *Lingle*. Specifically, petitioners argue that resolution of Norris' claim will require a court to interpret the labor agreement in order to determine whether he was indeed discharged, and whether his failure to sign off in connection with the work he performed justified the discipline meted out. Pet. Br. 43-44.

For reasons we have previously stated, petitioners' assertion that any claim that requires a court to make *some* reference to a labor agreement is preempted—either under *Lingle* or under the applicable RLA authority—is mistaken. See *Lingle*, 486 U.S. at 413, n.12; *McKin-*

has no say over the selection of the members of the arbitration board, who are typically management and union representatives, or of the neutral arbitrator if the board deadlocks. In this case, the System Board of Adjustment is created by agreement between the employer and the union, and the procedures adopted and the jurisdiction of the Board is a matter solely between the employer and the union. Labor Agreement, Art. XVI, Pet. App. 54a-58a. The union and the employer select the neutral arbitrator. *Id.* at 55a.

ney, 357 U.S. at 268, 270 (Veterans Act claims not preempted by the RLA "even though their determination may necessarily involve interpretation of a collective bargaining agreement," since "the actual character of the rights asserted" derive from a legal source other than the labor agreement).

But even apart from this, petitioners are simply mistaken when they assert that resolution of respondent's claim will require interpretation of the labor agreement. As the Court held in *Lingle*, the question of whether an employee has been discharged is obviously a "purely factual question." 486 U.S. at 407. At trial, respondent no doubt will rely on a letter from the Company stating that he was "terminated as of this day, August 3, 1987, for insubordination," Jt. App. 214, and the Company apparently intends to argue that the termination was rescinded by a letter dated September 10, 1987. Jt. App. 100. The issue to be decided will be whether the company's actions—whatever they were and however it may seek to justify them—make out the element of discharge under Hawaii law. Whether or not these same facts constitute discharge under the labor agreement is simply not relevant to Norris' case.

By the same analysis, for purposes of this lawsuit it is irrelevant whether HAL would have been justified under the labor agreement in terminating Norris for failing to sign off on work he performed—an issue which to be sure would require interpretation of the labor agreement. The claim that Norris chose to bring—as opposed to the claim that petitioners wish to have resolved through arbitration—is that HAL was motivated to fire him because he took his complaint to the FAA. That allegation raises a purely factual issue of motive, and one that will be resolved without having to consider whether the discharge is as well violative of the contract. As the Court indicated in *Lingle*, the issue of whether the employer acted out of a lawful motive under state law is a "purely factual inquiry [that] does not turn on the meaning of any provision of a collective-bargaining agreement." 486 U.S. at 407.

We hasten to reiterate that it is not our position—or the rule as enunciated in the decided cases—that only in claims such as this one where there is *no* contractual issue present is there no preemption. But wherever the appropriate line should be drawn,³⁰ this case is the easy one, and petitioners' arguments that HAL had sufficient reason under the agreement to terminate Norris misunderstand the nature of the claim Norris has chosen to bring to state court.

CONCLUSION

For the reasons stated above, the judgment of the Hawaii Supreme Court should be affirmed.

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³⁰ Petitioners thus assert that a claim should be preempted whenever the employer can raise as a defense an argument whose resolution requires interpretation of the labor agreement. Pt. Br. 44-45. We believe this assertion to be mistaken; indeed the Court already has rejected this argument in its decision in *Caterpillar*, 482 U.S. at 398-399. But even if petitioners accurately stated the law, it would be of no help to them here. HAL's only relevant defense is that it was *not* motivated by a desire to punish Norris for reporting the company's misconduct to the FAA. In the course of that argument, HAL may assert that it acted as it did because it believed its actions were authorized by the labor agreement. Whether HAL's interpretation of the labor agreement was in fact correct is irrelevant to determining HAL's true motive. For if HAL persuades a finder of fact that its true motive was a desire to enforce the labor agreement, Norris will lose his case, *regardless of whether or not HAL's interpretation of the agreement is sound.*

(17)

No. 92-2058

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC.,
v. *Petitioner,*

GRANT T. NORRIS,
and *Respondent,*

PAUL J. FINAZZO, HOWARD E. OGDEN and
HATSUO HONMA,
v. *Petitioners,*

GRANT T. NORRIS,
Respondent.

On Writ of Certiorari to the
Supreme Court for the State of Hawaii

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In our opening brief, we showed that respondent's state-law wrongful discharge claims are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, because (a) the RLA preempts state law as to "minor disputes" subject to mandatory arbitration; and (b) a wrongful discharge claim such as the one in this case is a classic RLA minor dispute. As to the first point, respondent argues that Congress did not intend for the RLA to effect a broad preemption of state law, but as we show in Part I below, the kind of preemption of state law that would result from requiring that minor disputes be brought pursuant to RLA arbitration procedures is precisely what Congress intended. As to the second point, respondent argues that his grievance is not a "minor dispute" because it is not based on a collective agreement, but as demonstrated in our opening brief (at 9-30) and in Part II below, the plain language of the RLA, its legislative history, and its interpretation by this Court make clear that retaliatory discharge claims are arbitrable grievances that fall squarely within the minor dispute provisions of the Act, whether or not they can be framed in a "non-contractual" way.

We also argued in our opening brief (at 43-45) that respondent's claims would be preempted by the RLA even if the category of minor disputes were limited to those involving interpretation or application of a collective agreement. As we show in Part III below, respondent's opposing argument, based on a narrow reading of *Lingle v. Norge Division of Magic Chef, Inc.* ("Lingle"), 486 U.S. 399 (1988), is flatly contrary to this Court's decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n* ("Conrail"), 491 U.S. 299 (1989), which held that a contractual defense may give rise to a minor dispute. Were respondent's reading of *Lingle* applied in the RLA context, courts would frequently be called upon to interpret and apply railroad and airline collective agreements in derogation of the RLA.

I. MINOR DISPUTES MUST BE RESOLVED THROUGH RLA ARBITRATION

Respondent's first argument is that the RLA does not generally displace state minimum substantive protections for employees. Respondent's argument fails to raise any real issue because we have not argued that state minimum substantive protections are set aside by the RLA. Rather, our position is that state laws are preempted only to the extent that they interfere with the RLA by attempting to remove minor disputes from the mandatory arbitration framework to which Congress assigned them. *E.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) ("Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict.")¹

The general proposition that state laws may not remove minor disputes from RLA arbitration ought not be controversial. Indeed, in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 322 (1972), this Court emphatically stated that "the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good

¹ Indeed, the issue raised in this case—"whether the Hawaii Supreme Court erred in concluding that respondent's state law wrongful discharge claims were not preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*," *Hawaiian Airlines, Inc. v. Norris*, No. 92-2058 (January 21, 1994)—is even more limited than that. As we argue below in Part II, state law wrongful discharge claims, and specifically "whistleblower" retaliatory discharge claims of the type asserted by respondent, are at the heart of the minor dispute category and therefore constitute the clearest example of claims preempted by the RLA. *See infra* pp. 6-17. Thus, this case does not present an occasion for deciding what other kinds of state claims involving other kinds of issues, such as "peripheral concerns" to the RLA or "deeply rooted" local concerns, might be preempted by the RLA in the event of an asserted conflict with the RLA statutory scheme. *Cf. Sears, Roebuck & Co. v. Carpenters Dist. Council (San Diego)*, 436 U.S. 180 (1978) (state trespass action upheld despite arguably protected/prohibited conduct within NLRA preemption test).

history and is no longer good law." In these circumstances, state laws that would permit minor disputes to be brought outside the RLA grievance processes are preempted because they "would frustrate the federal scheme" assigning such claims to mandatory arbitration. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).² In essence, the RLA prohibits states from taking employment disputes involving discipline and discharge out of the RLA arbitral forum and enlisting RLA employees as "private attorneys general" to prosecute violations of state employment standards through civil suits. (*See States Br. 11*). Thus, while states may enact minimum labor standards covering RLA employers to the extent permitted by federal statutes and the Constitution, and may even enforce such laws against carriers through regulatory processes, the RLA prohibits states from creating private causes of action for individual employees to enforce those laws.

The two RLA cases³ on which respondent relies (at 10-15) are wholly consistent with this approach; those cases addressed state minimum labor standards that were enforced by the state, rather than by private claims for relief brought by railway employees against their employers. *See Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, 250 n.1 (1931) (addressing Arkansas statute that regulated freight train crews and provided for fines against noncomplying carriers, but did not provide for a private right of action by employees). In *Terminal Railroad As-*

² Both the Hawaii Supreme Court and the Solicitor General have recognized that "mandatory [RLA] arbitration is the exclusive remedy for claims arising from minor disputes." Pet. App. 12a; *see Sol. Gen. Br. 8-10*.

³ Respondent also cites *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), but that case did not concern the RLA. Moreover, *Metropolitan Life* involved a state remedial provision enforced by the state attorney general, and did not provide a means by which individual employees could avoid adjustment procedures for disputes between them and their employers.

sociation of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 7 (1943), this Court upheld a regulatory order of the Illinois Commerce Commission on the grounds that the federal interest embodied in the RLA was concerned with "disagreements over working conditions" but would not be implicated by a state regulation dictating "working conditions themselves." 318 U.S. at 7.⁴

Respondent also relies on *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), which involved the entirely different question of whether Congress, in passing the RLA dispute resolution provisions, impliedly repealed the preexisting federal statutory cause of action for personal injuries to railroad workers under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* The standards for reconciling two federal statutes are designed to effectuate both statutes where possible, and are quite different from those involving preemption of state law by a single federal enactment.⁵ Therefore, the Court's decision in *Buell* finding that the RLA did not impliedly repeal employee FELA remedies does not stand for the proposition that states may enact laws that permit employees to circumvent RLA minor

⁴ Respondent implies (at 12-14) that *Terminal* allowed employees to sue independently to enforce the Illinois Commerce Commission ruling in state court. However, there is nothing to suggest that employees could sue under the Illinois regulatory scheme. Even if *Terminal* did not itself preclude state court actions by individual employees, the case was decided in the wake of *Moore v. Illinois Central Railroad*, 312 U.S. 630 (1941), and so the Court could reasonably have assumed concurrent state court jurisdiction over minor dispute claims.

⁵ *Compae, e.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (preemption analysis is rooted in the Supremacy Clause, such that "state law that conflicts with federal law is 'without effect'") (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)), with *Morton v. Mancani*, 417 U.S. 535, 551 (1974) ("courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent clearly expressed congressional intention to the contrary, to regard each as effective").

dispute resolution procedures.⁶ Indeed, as discussed *infra* at p. 16, *Buell*, read in context, clearly supports our position concerning the scope of minor disputes.

Preemption of state-law claims raising minor disputes would not, in fact, undermine the states' legitimate interests in regulating public safety or workplace conditions; nor would it threaten individual rights and interests. Provided that such state laws are consistent with other federal laws and the Constitution, they would remain enforceable against employers through regulatory channels, form the floor for negotiation of conditions under the bargaining agreement,⁷ and have to be taken into account in the RLA adjustment board process.⁸ Individual employees covered under the RLA have the right to pursue their own claims before adjustment boards, 45 U.S.C. § 153 First (i) and (j), and this Court has recog-

⁶ The Solicitor General (Br. 11, 14, 24-25) also includes *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), as a case recognizing states' power to enact and enforce substantive protections outside of the scope of the RLA. Respondent did not include *Colorado Anti-Discrimination* in his argument, perhaps recognizing that that case, which involved a claimant who was not covered by RLA adjustment board procedures, provides no insight on issues of RLA preemption. It may be, too, that respondent recognizes *Colorado Anti-Discrimination* to raise issues more closely akin to accommodation of federal statutes, given the special and supportive relationship of federal and state enforcement of laws protecting civil rights. 42 U.S.C. § 2000e-5(c) through (f). In any event, a state's power to issue cease-and-desist orders against offending carriers, as occurred in *Colorado Anti-Discrimination*, is not necessarily implicated by a rule requiring employees to submit minor disputes to the federally-mandated RLA arbitration procedures.

⁷ See, e.g., *Independent Metal Workers (Hughes Tool Co.)*, 147 NLRB 1573 (1964) (prohibiting bargaining to obtain illegal contract provisions discriminating among employees on invidious bases, such as race, sex, or national origin).

⁸ See, e.g., *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (recognizing public policy grounds for judicial rejection of arbitral awards).

nized that arbitral fora can and do provide meaningful and full protection of workers' public policy rights. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)⁹; *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974). That Congress itself has channelled RLA disputes into the arbitral forum counsels for even greater faith in that remedial scheme. Thus, the scope of preemption urged by petitioners preserves both the language and legislative intent underlying the RLA while at the same time avoiding infringement of the states' legitimate police power interests.

II. RETALIATORY DISCHARGE CLAIMS PRESENT ARBITRABLE MINOR DISPUTES

The issue as to which *certiorari* was granted in this case is "[w]hether the Hawaii Supreme Court erred in concluding that respondent's state law wrongful discharge claims were not preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*" *Hawaiian Airlines, Inc. v. Norris*, No. 92-2058 (January 21, 1994). For the reasons discussed above, that question turns on whether respondent's wrongful discharge claims constitute a "minor dispute" under the RLA. In our opening brief (Pet. Br. 8-36), we showed that the plain language of the RLA, its legislative history and underlying purposes, and its interpretation by this Court all establish that respondent's claims constitute a minor dispute subject to RLA arbitration. Respondent's brief (Resp. Br. 15-40) attempts, but ultimately fails, to support a contrary position using those same sources.

⁹ The Solicitor General (Br. 26-27 n.24) attempts to distinguish *Gilmer* on the ground that the claim therein was governed by the Federal Arbitration Act ("FAA"), which specifically excludes transportation industry employees from its scope. However, it is clear that Congress excluded those workers from the FAA exactly because their disputes are already subject to arbitration through separate legislation. See *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers*, 207 F.2d 450, 452 (3d Cir. 1953).

A. Statutory Language

This Court has repeatedly held that the plain meaning of a statute's language controls its interpretation.¹⁰ The statutory language at issue in this case defines the category of minor disputes as "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 204. Our basic contention is that by including disputes "growing out of grievances" in addition to disputes over interpretation or application, the RLA encompasses more than just disputes invoking some contractual right, and certainly encompasses non-contractual retaliatory discharge claims such as the one asserted here. See Pet. Br. 9-11.

Respondent advances a contrary interpretation, based on two arguments. First, respondent argues (Resp. Br. 17-18) that the term "grievances" does not include workplace discipline and discharge cases unless the "grievance" itself requires interpretation or application of the collective agreement. Such a construction reads the phrase "growing out of grievances" out of the statute. Second, respondent contends that the word "or," as used in the statute, cannot be understood in the traditional sense that the word is used, *i.e.*, as presenting alternatives, either one of which could satisfy a given condition. Thus, respondent contends that although the statute encompasses disputes "growing out of grievances *or* out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," it really only includes the latter category, with the former category being meaningless.¹¹

¹⁰ *E.g.*, *Negonsott v. Samuels*, 113 S. Ct. 1119, 1122-23 (1993); *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 241 (1989).

¹¹ This Court long ago held that "the construction of a statute is preferred which gives all the words in it an operative meaning." *Early v. Doe*, 57 U.S. (16 How.) 610 (1853). Respondent is wrong to suggest (at 20) that our reading of the term "griev-

Respondent's construction flies in the face of this Court's recognition that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *E.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (use of the phrase "business or property" in § 4 of the Clayton Act indicated that "property" means something other than "business").¹² Respondent speculates (Resp. Br. 21-22) that in enacting the phrase "growing out of grievances" as a separate category of disputes from those involving interpretation or application, Congress "could well have" intended to encompass implied as well as express agreements, or "might equally have been concerned" that individual as well as collective disputes be included. Even apart from the existence of legislative history refuting this contention, see below at 12-14, respondent's hypotheses as to what Congress might have intended are insufficient to overcome the presumption that in using the term "or" to apply to disputes "growing out of grievances," Congress meant to include disputes other than just those growing "out of the interpretation or application of agreements."¹³

ances" would render the interpretation/application category "mere surplusage." Because disputes over interpretation or application of agreements may be submitted to arbitration by employers as well as employees, 45 U.S.C. § 184, there are clearly interpretation/application disputes that are not "grievances." It is respondent's position, not ours, that attempts to read words out of the statute.

¹² See also *Brook Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993); *Garcia v. United States*, 469 U.S. 70, 73 (1984); *FCC v. Pacifica Foundation*, 438 U.S. 726, 739-740 (1978).

¹³ The appositional usage of "or" cited by the Solicitor General (Br. 15 n.13) is not consistent with the language of 45 U.S.C. § 204 because the phrase "out of" is repeated before both the word "grievances" and the words "interpretation or application of agreements." The grammar is clearly distinguishable from the appositional example—"fell over a precipice or cliff"—relied upon by the Solicitor General (Br. 15 n.13) based upon the third meaning of "or" from a 1986 dictionary. The phrase "fell over a precipice or

Moreover, respondent is flatly wrong in arguing that the word "grievances" as used in the RLA's "General Purposes" and "Adjustment Board" sections (45 U.S.C. §§ 151a(5), 153 First (i), and 204) encompasses in the labor relations setting only contractual grievances. One respected commentator writing contemporaneously with the adoption of the RLA in 1926 expressed the clear understanding that the term "grievances" was understood within the railroad industry to include disputes beyond the scope of the bargaining agreement:

Railroad labor disputes may be divided roughly into two classes: first, major disputes, those arising out of proposed changes in existing rates of wages, hours or working conditions; second, minor disputes, those arising out of the application or interpretation of the provisions of an award or an agreement with respect to wages, hours or working conditions. *Personal grievances are also ordinarily included in the category of "minor disputes."*

H. Wolf, *The Railroad Labor Board* 50 (1927) (emphasis added). Furthermore, the term "grievances," read in context applying normal rules of grammar and statutory construction, includes non-contractual claims by employees.¹⁴ Finally, discipline and discharge cases as a

over a cliff" would be analogous to Section 204's language, and that phrase conveys a purely disjunctive meaning, in which the word "fell" applies to the two separate categories, just as Section 204's language extends both to disputes growing out of grievances and also to disputes growing out of interpretation or application of agreements. None of the cases cited by respondent (at 19) and the Solicitor General (at 15) in which this Court has interpreted "or" in its appositional sense involved the repetition of a verb-preposition phrase as Congress did in Section 204.

¹⁴ For instance, the National Labor Relations Board has on numerous occasions used the term in its broadest sense; indeed, there is a category of unfair labor practices involving an employer's non-contractual solicitation of "grievances" that the NLRB has identified as violating NLRA Section 8(a)(1), 29 U.S.C. § 158(a)(1). See, e.g., *Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156, 1157 (7th Cir. 1990); *NLRB v. Aquatech, Inc.*, 926 F.2d 538, 544 (6th Cir. 1991).

class were considered to be within the category of "grievances" prior to the time that air carriers came to be encompassed within the Act. *E.g.*, Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 586 (1937) ("[q]uestions of discipline or refusal to promote (constituting 'grievances') are reviewable by the Board"); Pet. Br. 12-14.¹⁵

In Section 204, Congress further made it clear that adjustment board jurisdiction extended to non-contract-based discharge claims by transferring to adjustment boards "cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board." 45 U.S.C. § 184. Contrary to respondent's suggestion (Resp. Br. 22-23), Congress did not purport to limit the cases transferred from the NLRB to RLA adjustment boards solely to contract-based claims. To the contrary, Congress was well aware from testimony prior to enactment of Section 204 that public policy discharge claims would be among the types of claims expected to be transferred to RLA dispute resolution processes. *See* Pet. Br. at 12, 18. By contrast, there is absolutely nothing in the legislative history to support respondent's view that only contract-based claims were transferred.¹⁶

¹⁵ Respondent also argues that the CBA at issue in this case itself employs a limited definition of "grievance." This assertion has no bearing on this dispute, for it is Congress's construction of the term in the context of Section 204 which is at issue. Even if the parties' intent were at issue, the RLA language and legislative history would be the appropriate starting place for the discussion, since the CBA in Art. XVII.P specifically provides that the CBA cannot be construed in any way to limit the rights of employees, their unions, or the company under the RLA. (Pet. App. 58a.) Moreover, even if the parties to the CBA sought to exclude a class of covered grievances from RLA-mandated procedures, it would be precluded from doing so. *Capraro v. United Parcel Serv. Co.*, 993 F.2d 323, 336-337 (3d Cir. 1993).

¹⁶ Thus, for instance, the NLRB's annual reports from the same period do not indicate that any attempt was made by the NLRB to limit the types of airline cases transferred to RLA dispute resolution bodies. *See First Annual Report of the National Labor Relations Board* (1936) at 29, 30, 35, 36, 39, 41, 43; *Second An-*

In addition, Congress has expressly referred railroad employees' "whistleblower" claims to RLA arbitration. 45 U.S.C. § 441(c); *see* Pet. Br. 12-14. The Solicitor General *concedes* (at 13 n.11) that railroad employees' state-law whistleblower claims "may be preempted" by this statutory provision, but argues that Congress would not have found it necessary to refer such claims to arbitration had it thought they were already there. That argument completely ignores legislative history demonstrating that Congress in fact had the opposite understanding: that employees "already receive[d] similar protection . . . through the grievance procedure" existing at the time, and the addition of statutory language was not meant "to alter the existing protection, but rather to put the prohibition of discrimination into statutory form." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8 (1980). Because airline employees are subject to the "existing protection" provided by the RLA, their whistleblower claims are also subject to RLA grievance procedures, and, thus, under the Solicitor General's logic as well as our own, their state law claims are preempted.

Respondent, but not the Solicitor General, argues (Resp. Br. 30) that the FRSA's "election of remedies" provision, 45 U.S.C. § 441(d), allows employees to pursue state-law whistleblower actions. This argument is easily dispensed with. As the Fourth Circuit held in *Rayner v. Smirl*, 873 F.2d 60, 66 n.1 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989), a case cited with approval by the Solicitor General (at 13 n.11), section 441(d) does not provide an employee with an election of remedies to pursue state-law wrongful discharge claims pursuant to "the common law remedies of the fifty states," but rather was intended to preserve existing *federal* remedies.

Annual Report of the National Labor Relations Board (1937) at 15, 20, 21, 24, 25, 26, 28. Nor would it be expected that the NLRB would retain any airline cases in light of the specific exclusion of RLA employers from NLRA coverage since that Act's inception. *See* NLRA Section 2(2), contained in 2 NLRB, *Legislative History of the National Labor Relations Act of 1935*, at 3271 (1935).

Indeed, Congress made clear that "the protections provided [in the Act] would be enforced *solely* through the existing grievance procedures provided for in Section 3 of the Railway Labor Act," and that it "intend[ed] this to be the *exclusive* means for enforcing this section." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8, 16 (emphasis added), reprinted in 1980 U.S.C.C.A.N. 3830, 3832, 3841.¹⁷

B. Legislative History

In our opening brief (at 15-19), we showed that the RLA's legislative history, from the time of its enactment through its subsequent revisions, supports our position that disputes over discharge and discipline, even if non-contractual in origin, are "grievances" within the scope of the Act. Thus, for instance, key legislators at the time the RLA was passed expressed the understanding that the category now known as minor disputes included "grievances" and "*also . . . disputes arising out of the interpretation and application of existing agreements*," 67 Cong. Rec. 8807 (1926) (statement of Sen. Watson) (emphasis supplied), and "disagreements over grievances, interpretations, discipline, and other technicalities that arise from time to time in the workshop and out on the tracks in the operation of the roads." 67 Cong. Rec. 4517 (1926) (statement of Rep. Barkley).

Respondent cites (Resp. Br. 25-26) three portions of the RLA's legislative history to claim that the quoted legislators defined the category of minor disputes in narrower terms as encompassing only disputes over interpretation or application of agreements. In each case, however, the topic at hand was not the general scope of the minor dis-

¹⁷ Whereas respondent insinuates (Resp. Br. 16) that the RLA adjustment procedures are inadequate to adjudicate claims of the type presented here, Congress has taken exactly the opposite view in expressly retaining employee whistleblower claims within the RLA structure pursuant to the FRSA. It should also be noted that this Court has ignored claimed inadequacies of the grievance procedure when considering the preemptive power of the RLA. See Petitioners Br. 29 n.19. See also *Andrews*, 406 U.S. at 330, 335-336 (Douglas, J. dissenting).

pute category, but rather the distinction between minor disputes and major disputes, which involve "disputes over the formation of collective agreements or efforts to secure changes in them." *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945). Thus, a portion of the quotation from Representative Barkley (Resp. Br. 25), omitted in ellipses from respondent's brief, makes clear that the quoted passage refers to a contrast between the role of adjustment boards in resolving minor disputes and a role *not* given to such boards—dealing with "changes of wages, their increases or decreases or change in working conditions or hours of service." Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, As Amended (1926 through 1966)* 192 (Comm. Print 1974) [hereinafter cited as "RLA Leg. Hist."].

Likewise, the sentence immediately prior to the second quotation from Representative Barkley (Resp. Br. 26), also omitted from respondent's brief, makes clear that he was drawing a distinction between the adjustment boards' power to interpret or apply agreements and the fact that "[t]he adjustment boards were not given the power to consider changes in working conditions." RLA Leg. Hist. 205. Finally, respondent's quotation from Senator Watson (Resp. Br. 26), omits in ellipses remarks making clear that he too was contrasting the adjustment boards' power to settle disputes over the interpretation and application of agreements "though they do not deal with the larger and more drastic and the more dangerous problem of *changes in the rates of pay or in the conditions of service or in the hours of work*." RLA Leg. Hist. 480 (emphasis added).¹⁸

It should not be surprising that legislators might have used narrower language concerning interpretation/applica-

¹⁸ Although respondent also attempts to divine significance in quotations from Donald Richberg (at 24-25 & n.20), a private citizen testifying before a different Congress about a bill that did not pass, those quotations also appear to have been made in the context of distinguishing major from minor disputes.

tion of agreements in distinguishing minor disputes from major disputes. As we showed in our opening brief in discussing the *Conrail* case (at 26-27), and as respondent nowhere rebuts, the distinction between major and minor disputes is fundamentally about the character of a dispute vis-a-vis an agreement: whether a dispute involves a change in an agreement subject to NMB mediation procedures (major dispute), or involves interpretation of an agreement subject to RLA arbitration (minor dispute). This dividing line does not call into play the type of individual discipline and discharge grievances at issue here, which are clearly *not* major disputes.

As to subsequent amendments to the RLA, respondent cites (Resp. Br. 28) a statement from a House Report in connection with the 1934 amendments as equating "grievances" with contractual disputes. That same Report noted, however, that "[t]he bill does not introduce any new principles into the existing Railway Labor Act," H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2, 6 (1934), and we have shown that neither the statutory language nor Congress's intent was so limited. Respondent also relies upon a House Report on the 1936 amendments excusing a delay in the formation of airline adjustment boards on the ground that they would have "nothing to do" pending formation of agreements in the airline industry, but respondent omits the very next passage of that Report, which states that "*temporary boards might be created . . . to settle individual disputes*" during this interim contract-formation period. H.R. Rep. No. 2243, 74th Cong., 2d Sess. 1 (1936).

C. Supreme Court Decisions

In *Burley*, this Court established that minor disputes "relate[] either to the meaning or proper application of a particular provision *or* to an omitted case" in which "the claim is founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement.*" 325 U.S. at 723 (emphasis added). Whereas respondent claims that the *Burley* Court

reached this question in *dicta*, a fair reading of that case establishes otherwise. The issue in *Burley* was whether the union or the individual employee had the final say in settling minor disputes. The Court found it "difficult to believe" that Congress intended to "submerge wholly the individual . . . interests" not only with regard to "forming the contracts which govern their employment relation, but also in giving effect to them *and to all other incidents of that relation.*" 325 U.S. at 733-34 (footnote omitted) (emphasis added). As the Court explained, submerging the employee's interest to that of the union could have "drastic effects" in cases "where the grievance arises from *incidents of the employment relation not covered by a collective agreement*, in which presumably the collective interest would be affected only remotely, if at all" *Id.* at 736. Thus, while the employee claims addressed in *Burley* were contractual in nature, the existence of RLA arbitral jurisdiction over non-contractual grievances played an important part in the Court's holding in that case.¹⁹

Nor can respondent cast off the weight of *Burley* by arguing that the omitted case described therein applies only to "implied" contract terms. That argument is flatly inconsistent with the *Burley* Court's identification of a personal injury claim as an example of an omitted case. Moreover, the central premise of *Burley* is that there is a class of disputes within RLA jurisdiction as to which "the collective interest would be affected only remotely," 325

¹⁹ Respondent also argues that *Burley*'s omitted case discussion "was based on the understanding that the grievance-arbitration procedures provided for in the RLA are optional" pursuant to this Court's since-overruled *Moore* decision, and that the quoted language has thus gone the way of *Moore* itself. But *Burley*'s explanation of the scope of the minor dispute category was in no way dependent on *Moore*, and in any event, this Court in *Conrail* expressly recognized and quoted *Burley*'s "omitted case" discussion long after *Moore* had been overruled. 491 U.S. at 303. *Conrail*'s use of the above-quoted language from *Burley* is also fatal to respondent's argument (at 35-36 n.25) that this Court somehow undermined this language by failing to repeat it in its opinion on rehearing in *Burley*.

U.S. at 736, and implied contract terms implicate the collective interest in just the same way as express provisions. See, e.g., *Conrail*, 491 U.S. 299 (1989) (suit over "implied" contract term prosecuted by labor organization).

Finally, this Court's recent decision in *Buell* accords with *Burley*'s expansive reading of the minor dispute category. In *Buell* this Court could have avoided the question of whether the RLA impliedly repealed FELA remedies by simply adopting the Ninth Circuit's finding that the employee's personal injury claim was not a minor dispute within RLA adjustment board jurisdiction. See *Buell v. Atchison, Topeka and Santa Fe Ry.*, 771 F.2d 1320, 1323 (9th Cir. 1985) (dispute was not an arbitrable minor dispute because "it is neither related to the collective bargaining process nor arguably governed by its provisions"). Instead the Court expressly assumed that an RLA adjustment board would have jurisdiction over *Buell*'s non-contract-based personal injury claim, and cited prior cases involving ordinary personal injury claims—also apparently unrelated to the terms of any bargaining agreement—for the proposition that practices causing personal injuries "might have been cured or avoided by the timely invocation of the grievance machinery." 480 U.S. at 564 & n.11.

Andrews establishes that wrongful termination claims which constitute "minor disputes" must be resolved through RLA arbitration even if the claimant might enjoy better procedures and remedies if allowed to pursue a claim arising from the discharge under state law. 406 U.S. at 325; see Pet. Br. 28-30. Based on the Court's observation in *Andrews* that the source of the employee's claim was the collective bargaining agreement, respondent argues that *Andrews* held affirmatively that only contract-based claims are minor disputes under the Act. If *Andrews* had so held, it would have amounted to an overruling of *Burley*, and there is no evidence that the Court intended such a result. Moreover, since *Burley*'s omitted case discussion was cited with approval in *Con-*

rail, see note 19 *supra*, respondent's attempt to convert observations concerning a characteristic of the claim in *Andrews* into an unwarranted legal limitation on the scope of minor disputes is wholly unavailing.²⁰ Indeed, respondent's position is inconsistent with the strongly-expressed policy in *Andrews* and its progeny that artful pleading and forum shopping should not be allowed to undermine the integrity of the RLA's mandatory processes. See Pet. Br. 38-39 (citing cases).

III. RESPONDENT'S READING OF *LINGLE* IS TOO NARROW

We showed in our opening brief (Pet. Br. 39-43) that the Hawaii Supreme Court erred in analogizing preemption under the RLA to the LMRA Section 301 preemption rule applied in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). This is so, in the first instance, because the RLA minor dispute category includes non-contractual grievances in addition to disputes over the interpretation or application of agreements, while Section 301 relates only to "suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). Respondent's argument that the standard applied in *Lingle* is apt (Resp. Br. 40-48) stems from a contrary understanding of the scope of the RLA's minor dispute provisions, and thus falls along with its premise.²¹

²⁰ *Andrews* also disposes of respondent's suggestion (Resp. Br. 33) that the Seventh Amendment requires recognition of a jury trial right here. The Dissenting Justice's Seventh Amendment protestations, see 406 U.S. at 329 (Douglas, J., dissenting), were not even addressed by the *Andrews* Court. Numerous other decisions of this Court hold state common law claims, and any allied right to a jury trial, preempted by federal statutes. E.g., *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620-21 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 481, 483 (1990); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 315, 327 (1981).

²¹ For other differences between the RLA and LMRA that counsel against importation of the *Lingle* rule into the RLA context, see Pet. Br. 39-43.

Even if an attempt were made to import the rule in *Lingle* into the RLA context—*i.e.*, even if the line were drawn so that only interpretation/application disputes would be deemed minor disputes—the narrow interpretation of *Lingle* advanced by respondent would still be flatly inconsistent with the RLA. Respondent first argues under *Lingle* (Resp. Br. 48-50) that contractual defenses asserted by an employer do not count for purposes of analyzing whether a claim is preempted. That argument is clearly wrong under this Court's decision in *Conrail*, however, which held that the existence of even an "arguabl[e]" contractual defense is sufficient to create a minor dispute. 491 U.S. at 307.²²

Second, respondent argues that it does not matter whether resolution of the claim requires "some reference to a labor agreement," but rather only whether reference to an agreement is implicated in the formal legal elements of the claim asserted, here said to be "a purely factual issue of motive." Resp. Br. 48-49 (emphasis in original). Putting aside the fact that questions of motive do involve contract interpretation,²³ respondent's proffered legal rule in effect asserts that courts may interpret labor agreements in the course of deciding state-law tort claims so long as

²² Respondent's citation (Resp. Br. 50 n.30) to *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), is inapposite. *Caterpillar* merely held that a state law claim may not be removed from state court to federal court based on anticipated federal defenses. It did not address whether those defenses preempt state law claims.

²³ In resolving motive issues in discharge cases, courts routinely examine contractual provisions. *See, e.g., Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1018 (11th Cir. 1982) (employer may rebut plaintiff's prima facie case of unlawful discrimination by showing that less favorable treatment of employee was in accordance with union contract). Because the plaintiff in such a case bears the ultimate burden of persuasion regarding the employer's motive for discharge, *see NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the plaintiff must address contract interpretation issues to rebut the defendant's proffered motive.

the need to interpret the agreement does not arise from the formal legal elements of the claim being asserted. That is not how the lower courts have interpreted *Lingle*,²⁴ but even if the case were otherwise, such a rule clearly could not obtain under the RLA, where adjustment boards are given *exclusive* jurisdiction to interpret rail and airline labor agreements. *E.g., Pennsylvania R.R. v. Day*, 360 U.S. 548, 553 (1959).

These errors in respondent's analysis are important because, as we showed in our opening brief (at 43-45), adjudication of respondent's wrongful discharge claims in state court *would* involve issues of interpretation of the labor agreement, including a determination of whether respondent was in fact "discharged,"²⁵ whether there was "just cause" to discharge respondent as the agreement re-

²⁴ *See, e.g., Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 530 (10th Cir. 1992) ("[a]n analysis of whether T.G. & Y. acted properly or not will inevitably require an analysis of what the CBA permitted"); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 537 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 912 (1992). We do not mean to suggest that *Lingle* has been a bright line test which has been consistently and uniformly applied by the lower courts; it clearly has not. *See, e.g., Beard v. Carrollton R.R.*, 893 F.2d 117, 122 & n.1 (6th Cir. 1989) (contrasting Kentucky's law of wrongful interference with contract, which makes breach of contract an essential element of the claim, with Ohio's doctrine, which does not, and holding that a state-law claim would be preempted under Kentucky law but not Ohio law); *Magerer v. John Sexton & Co.*, 912 F.2d 525, 529 (1st Cir. 1990).

²⁵ Respondent (Resp. Br. 49-50) and the Solicitor General (Br. 12-14) assert that whether Norris was "discharged" may be determined solely by looking at state law and ignoring the collective bargaining agreement and practices thereunder. This analytical approach eviscerates RLA grievance procedures, which provide for orderly review and adjustment of discipline. Because respondent's own invocation of the grievance machinery resulted in the termination being converted to a suspension, Norris should not now be able to ignore the more favorable result he obtained from the company through the grievance process. *Cf. Union Pacific R.R. v. Price*, 360 U.S. 601 (1959) (employee may not file state court claims seeking redetermination of matters previously adjudicated in RLA grievance proceeding he himself had initiated).

quires, whether Article IV.D(a) of the CBA justified discipline of Norris for refusing to sign work records, and whether Article XVII.F of the CBA, which protects employees from discipline for refusal to work in violation of state or federal safety laws, applies to respondent's dispute. Accordingly, even if the RLA standard for preemption required that the dispute involve interpretation or application of an agreement, respondent's wrongful discharge claims would be preempted under such a standard.

In our opening brief and in the preceding sections, petitioners offer a solution to the RLA preemption debate which gives full weight to all relevant statutory language, proper context to the RLA's history and purpose, and due deference to each of the prior rulings of this Court. In contrast, respondent's approach writes substantive provisions out of RLA Sections 151a(5), 153 First (i), and 204; requires an abandonment of traditional statutory construction rules; encourages forum shopping and inconsistent results; undermines the RLA's scheme for resolution of workplace disputes; and requires a reversal of *Burley's* explicit holding, cited with approval in *Conrail*, that non-contractual disputes fall within the scope of RLA adjustment board jurisdiction.²⁶

²⁶ Contrary to respondent's assertion (Resp. Br. 31-32 and n.22), there are many examples of adjustment boards taking into account statutory protections and public policies in resolving RLA minor disputes. See Public Law Board No. 1483, Award No. 15 (November 7, 1975) (construing agreement in light of Hours of Service Law); NRAB Third Division Award No. 14113 (January 25, 1966) (deciding grievance by reference to California law imposing limit on weight women could be ordered to lift); NRAB Third Division Award No. 12970 (October 14, 1964) (deciding grievance by reference to municipal licensing rules); NRAB Third Division Award No. 4975 (July 31, 1950) (agreement construed in light of Hours of Service Law); NRAB First Division Award No. 11224 (February 24, 1947) (construing case law regarding continuity in service rules). Copies of these awards have been lodged with the Clerk of this Court. To the extent other boards have erroneously felt themselves constrained to avoid such matters, this Court is in a position to correct them with the decision herein.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC., ET AL., PETITIONERS

v.

GRANT T. NORRIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

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QUESTION PRESENTED

Whether respondent's state law wrongful discharge claims are preempted by the Railway Labor Act, 45 U.S.C. 151 *et seq.*

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**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

INTEREST OF THE UNITED STATES

The question presented in this case is whether the Supreme Court of Hawaii erred in concluding that respondent's state law wrongful discharge claims are not preempted by the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.* The RLA is designed to prevent the interruption of interstate commerce and to provide an exclusive mechanism for the prompt and orderly resolution of all disputes in the covered industries "growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a. The United States has a substantial interest in furthering the purposes served by the Act and its exclusive arbitral mechanism, while at the same time avoiding unnecessary encroachment upon the ability of the

States to legislate on matters of legitimate state concern. At the Court's invitation, the United States filed a brief *amicus curiae* at the petition stage of this case.

STATEMENT

1. Petitioner Hawaiian Airlines, Inc. (HAL), employed respondent as an aircraft mechanic. Respondent's license, issued by the Federal Aviation Administration (FAA), authorized him to approve an aircraft for service after making, supervising, or inspecting repairs. He was not authorized to approve for service any aircraft the repairs of which did not conform to applicable federal regulations. The FAA may suspend or revoke the license of a mechanic who makes a fraudulent entry in any record or report required by those regulations. Pet. App. 7a.

During a routine inspection on July 15, 1987, respondent noticed that one of the tires on an HAL DC-9 was worn. After removing the tire and bearing, he and other mechanics noticed that the axle sleeve, which is normally mirror-smooth, was scarred and grooved. Although respondent and the other mechanics believed that the axle sleeve was therefore unsafe and in need of replacement, respondent's supervisor, Justin Culahara, ordered the mechanics to sand the sleeve by hand and put a new bearing and tire over it. After the specified repairs were performed, the plane made its scheduled flight. Pet. App. 7a.

At the end of respondent's shift, Culahara directed him to sign the maintenance record for the installation of the tire. Under applicable federal regulations (14 C.F.R. 43.9(a)), that record would have served to certify that the repair work had been satisfactorily performed. Respondent refused to sign the form on the ground that the sleeve was still unsafe. He said that he would sign the form only if Culahara could show him that the DC-9 manual indicated that the axle sleeve was in satisfactory condition. Culahara told respondent he would be discharged if he did not sign. When respondent persisted in his refusal,

he was immediately suspended pending a termination hearing. Respondent subsequently reported to the FAA that there was a problem with an HAL aircraft that he had serviced. Pet. App. 7a-8a.

On July 31, 1987, respondent was represented by a union representative at a so-called "Step 1" grievance hearing. Three days later, the hearing officer recommended that respondent be terminated for insubordination.¹ Pet. App. 63a-65a. Respondent then invoked the grievance procedures available under the applicable collective bargaining agreement, which provides that an employee may be discharged only for "just cause" and may not be disciplined for refusing to perform work in violation of a health or safety law. *Id.* at 8a. The grievance process proceeded to "Step 3," which entails a hearing before the head of the department in which the employee works. *Id.* at 9a & n.6, 51a. Prior to the hearing, HAL offered to reduce the punishment to suspension without pay for six weeks. Respondent never replied to the offer or, apparently, took further steps to pursue the grievance. *Id.* at 9a.

2. a. This case is a consolidation of two lawsuits relating to respondent's discharge. On December 8, 1987, respondent filed an action in state court against HAL. *Norris v. Hawaiian Airlines, Inc.*, Civ. No. 87-3894-12 (Haw. Cir. Ct., 1st Cir.); Pet. App. 9a. He alleged that HAL discharged him in violation of the public policy expressed in the Federal Aviation Act and implementing regulations (Count I); that HAL's actions violated the Hawaii Whistleblower's Protection Act (HWPA), Haw. Rev. Stat.

¹ After respondent's discharge, he gave the FAA details of what had occurred on July 15, 1987. On August 4, 1987, the FAA seized the axle sleeve and initiated an investigation. The FAA broadened its investigation to other HAL planes. Pet. App. 8a. On March 2, 1988, the FAA proposed a civil penalty concerning the damaged sleeve. The FAA and HAL later settled the case. J.A. 292-294.

§§ 378-61 to 378-69 (1994) (Count II);² that HAL intentionally inflicted emotional distress on him (Count III); that HAL engaged in outrageous conduct, entitling him to punitive damages (Count IV); and that HAL breached the collective bargaining agreement (Count V). See 12/8/87 Compl. ¶¶ 22, 28, 31, 33, 39; J.A. 7-10.

HAL removed the case to the United States District Court for the District of Hawaii. On March 28, 1988, the district court dismissed Count V, holding that it was subject to the exclusive arbitral procedures of the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and therefore preempted. 3/28/88 Dist. Ct. Order 14-15; J.A. 342-344. The court remanded the remainder of the claims to the state trial court. 3/28/88 Dist. Ct. Order 16-17; J.A. 344-345; Pet. App. 9a n.7.

On December 5, 1990, the state trial court dismissed Count I of the complaint against HAL, reasoning that it lacked subject-matter jurisdiction because respondent's claim was preempted by the RLA. See 12/5/90 Haw. Cir. Ct. Order 2; Pet. App. 28a. The court certified its order as final under state rules of civil procedure (Haw. R. Civ. P. 54(b)) so that respondent could take an immediate appeal. 12/5/90 Haw. Cir. Ct. Order 2.³

² The Hawaii Whistleblower's Protection Act provides in pertinent part that an employer "shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because *** [t]he employee *** reports or is about to report to a public body *** a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false." Haw. Rev. Stat. § 378-62(1) (1994). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. Haw. Rev. Stat. § 378-63(a) (1994).

³ Although the Hawaii Supreme Court vacated the state trial court's initial order because the federal district court's remand order was not part of the record (Pet. App. 9a n.7), the remand order was later made part of the record, the judgment of dismissal was reinstated, and petitioner took a fresh appeal from that judgment. *Id.* at 28a.

b. On September 20, 1989, respondent filed suit against petitioners Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma, all of whom were officers of HAL when respondent was discharged. *Norris v. Finazzo*, Civ. No. 89-2904-09 (Haw. Cir. Ct., 1st Cir.); Pet. App. 9a-10a. Respondent alleged that the individual petitioners directed, confirmed, or ratified the alleged retaliatory discharge. He again sought relief on theories of discharge in violation of public policy (Count I); violation of the HWPAA (Count II); intentional infliction of emotional distress (Count III); and outrageous conduct entitling him to punitive damages (Count IV). 9/20/89 Compl. ¶¶ 22, 28, 31, 33; J.A. 16-18. On December 5, 1990, the state trial court dismissed Counts I and II and certified the case for immediate appeal. 12/5/90 Haw. Cir. Ct. Order 2-3.

3. The Supreme Court of Hawaii reversed in both cases. Pet. App. 1a-26a (*Finazzo*); *id.* at 27a-29a (*Hawaiian Airlines, Inc.*). The court first observed that respondent's retaliatory discharge claims are subject to the RLA's exclusive arbitral mechanism (and are therefore pre-empted) if they are "minor disputes" for purposes of the RLA, *viz.*, if they are disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 U.S.C. 153 First (i)). Pet. App. 12a. The court concluded that respondent's claims are not pre-empted under that standard.

Relying on this Court's decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 305 (1989), the state supreme court explained that "minor disputes" are "those that 'may be conclusively resolved by interpreting the existing [collective bargaining] agreement.'" Pet. App. 14a. In the court's view, the retaliatory discharge claims could not be resolved in that way: "[Respondent's] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a

retaliatory discharge is sanctioned or justified by a provision in the [collective bargaining] agreement nor do they point to any part of the [agreement that] demonstrates that the carrier and union have agreed on standards relevant to [respondent's] situation." *Id.* at 19a.

The court rejected petitioners' argument that the retaliatory discharge claims are preempted because it is necessary to construe the collective bargaining agreement to determine whether HAL had terminated respondent for insubordination, and thus for "just cause." Pet. App. 18a-19a. The court pointed out that in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185, this Court held that a claim of wrongful termination in retaliation for filing a state worker's compensation claim did not require interpretation of a collective bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. Pet. App. 15a-16a. The Supreme Court of Hawaii determined that, as in *Lingle*, the claims in this case do not turn upon an interpretation of the labor contract, but upon "purely factual questions [that] pertain[] to the conduct of the employee and the conduct and motivation of the employer." Pet. App. 19a (quoting *Lingle*, 486 U.S. at 407).

SUMMARY OF ARGUMENT

A. The Railway Labor Act (RLA), 45 U.S.C. 153 First (i), establishes an exclusive arbitral mechanism for so-called "minor disputes," which are disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." This Court has explained that arbitration of minor disputes is compulsory and binding, and that States may not supplement the Act's arbitral remedy for minor disputes with state law judicial remedies.

B. The test for whether an employee's claim is a "minor dispute" subject to the Act's exclusive arbitral mechanism

is whether the claim can be "conclusively resolved" under the collective bargaining agreement. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 305 (1989). Applying that test, the Supreme Court of Hawaii properly held that petitioner's state law tort claims are not preempted. Because respondent's claims are independent of any right he may have under the collective bargaining agreement and require proof that petitioners discharged him for a retaliatory motive that is impermissible under state tort law—and because the agreement would not justify a discharge that was so motivated—respondent's claims cannot be conclusively resolved by interpreting the labor contract.

C. Petitioners err in contending that the language of the RLA requires preemption of extra-contractual claims because it applies to disputes "growing out of grievances or out of the interpretation or application" of the contract. 45 U.S.C. 153 First (i) (emphasis added). This Court has recognized that the word "or" does not necessarily require that phrases separated by the "or" be given independent meaning. The term "grievance," moreover, is commonly understood in the labor law context to refer to claims arising out of a collective bargaining agreement. The legislative history of the 1926 and 1934 legislation establishing the RLA's arbitral mechanism does not warrant a different conclusion.

In any event, this Court has since held that the preemptive force of the RLA's arbitral mechanism arises from the existence of a contract claim, *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972), and that the RLA's arbitral mechanism does not bar the imposition of tort duties independent of the collective bargaining agreement or preempt the field of regulation of working conditions themselves. *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714

(1963); *Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen*, 318 U.S. 1 (1943).

D. This Court's decisions addressing labor preemption under Section 301(a) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 185(a), provide a pertinent analogy for RLA preemption cases. The question addressed in both RLA and LMRA preemption cases is the same: how to accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interests of the States in regulating the conduct of employers subject to their police power.

ARGUMENT

RESPONDENT'S STATE TORT CLAIMS CANNOT BE CONCLUSIVELY RESOLVED BY INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT AND ARE THEREFORE NOT "MINOR DISPUTES" SUBJECT TO THE EXCLUSIVE ARBITRAL MECHANISM OF THE RAILWAY LABOR ACT

A. The Railway Labor Act Establishes An Exclusive Arbitral Mechanism For "Minor Disputes"

The Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, was enacted, *inter alia*, to establish a mechanism for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a(5). As this Court has explained, these so-called "minor disputes," *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945), *aff'd on reh'g*, 327 U.S. 661 (1946), involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30, 33 (1957); see also

Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n, 491 U.S. 490, 496 n.4 (1989) (same).⁴

The RLA establishes an elaborate arbitral mechanism for the resolution of minor disputes. See 45 U.S.C. 153 First (i) (railroad industry); 45 U.S.C. 184 (airline industry). It requires that minor disputes first be submitted to a carrier's "internal dispute resolution processes." *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 563 (1987); 45 U.S.C. 153 First (i), 184. If the dispute cannot be resolved internally, either party may refer it to arbitration before the National Railroad Adjustment Board (NRAB) or an adjustment board established by the employer and unions. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303-304 (1989) (*Conrail*); see also 45 U.S.C. 153 First (i) and Second, 184.⁵

⁴ This Court adopted the "major/minor" dispute terminology "from the vocabulary of rail management and rail labor." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989) (*Conrail*). The term "major dispute" refers to "disputes over the formation of collective agreements or efforts to secure them," *Burley*, 325 U.S. at 723, or over "proposals to change rates of pay, rules, or working conditions," *Pittsburgh & L.E. R.R.*, 491 U.S. at 496 n.4. In the case of a "major dispute," the RLA requires the parties "to undergo a lengthy process of bargaining and mediation." *Conrail*, 491 U.S. at 302; see 45 U.S.C. 152 Seventh, 155, 156. Petitioners do not argue that the claims in this case constitute "major disputes." See Br. 11 n.3.

⁵ The NRAB consists of 34 members, half of whom are selected by railroads and half of whom are selected by national labor organizations. 45 U.S.C. 153 First (a). The Act also provides that "any individual carrier, system, or group of carriers and any class or classes of its or their employees" may agree to establish "system, group, or regional" boards of adjustment. 45 U.S.C. 153 Second. The arbitral scheme differs somewhat for the airline industry, to which Congress extended the RLA in 1936. See Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189; 45 U.S.C. 181-188. The principal difference between the two statutory schemes, which is not material here, is that Congress left the creation of a national adjustment board for airlines to the discretion of the National Mediation Board. See 45 U.S.C. 185; *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685-686 (1963). In the absence of a national board, minor disputes are adjudicated exclusively

The submission of a minor dispute to arbitration is "compulsory and binding" upon the parties. *Conrail*, 491 U.S. at 303-304; see 45 U.S.C. 153 First (i). "Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation." *Burley*, 325 U.S. at 727; see 45 U.S.C. 153 First (i). And the decision of an adjustment board arbitrating a minor dispute is expressly made "final and binding upon both parties to the dispute." 45 U.S.C. 153 First (m); see *Chicago R. & I. R.R.*, 353 U.S. at 35.⁶

This Court has interpreted the RLA's compulsory arbitration provisions to preclude resort to judicial remedies for minor disputes other than the judicial review provisions of the RLA itself. See *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972). In *Andrews*, the Court held that a railroad employee's state law wrongful discharge claim is subject to the RLA's exclusive arbitral mechanism where the "source of [the employee's] right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement"—i.e., if "[the

by system adjustment boards formed by the airlines and unions under 45 U.S.C. 184. See *Conrail*, 491 U.S. at 304 n.4.

⁶ The compulsory aspect of the statutory scheme was a product of the 1934 amendments to the RLA. See H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-4 (1934). Under the 1926 version of the Act, the formation of boards of adjustment to resolve minor disputes was left to the agreement of the parties. Railway Labor Act of 1926, ch. 347, § 3, 44 Stat. 578-579. Under that system, each party could "defeat the intended settlement of grievances by declining to join in creating the local boards of adjustment provided for by the Act." *Burley*, 325 U.S. at 726. As a result, the machinery quickly broke down, and grievances accumulated to the point that on several occasions employees resorted to the issuance of strike ballots and threats to disrupt commerce. H.R. Rep. No. 1944, 73d Cong., 2d Sess. 3 (1934). Congress in 1934 established the present system, creating the NRAB and vesting it and other adjustment boards with authority finally to resolve minor disputes. See *Chicago R. & I. R.R.*, 353 U.S. at 35-39; Act of June 21, 1934, ch. 691, § 3, 48 Stat. 1189-1192.

employee's] claim, and [his employer's] disallowance of it, stem from differing interpretations of the collective-bargaining agreement." *Id.* at 324. Finally, a party who has litigated an issue before an adjustment board may not relitigate the issue in a separate judicial proceeding, but may seek only the limited judicial remedy available under the review provisions of the RLA. *Id.* at 325; see *Gunther v. San Diego & A. E. Ry.*, 382 U.S. 257, 261-264 (1965).⁷

B. Respondent's State Tort Claims Are Not "Minor Disputes" Because They Cannot Be Conclusively Resolved By Interpreting The Collective Bargaining Agreement

1. The RLA does not generally impose substantive limitations on the States' police power, or authorize parties to a collective bargaining agreement to agree to that which State law prohibits as a matter of public policy and places beyond the parties' power to contract away. See *Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6-7 (1943); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963); see also *Buell*, 480 U.S. at 563-565; cf. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985). Rather, because the RLA's preemption of state law remedies results directly from its channeling of minor disputes through the exclusive arbitration scheme, the question of preemption in this case turns on whether respondent's claims are minor disputes, that is, whether they are

⁷ The Court in *Andrews* overruled *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941). See 406 U.S. at 326. In *Moore*, the Court had permitted a railroad employee to bring a state law damage action alleging "that he had been wrongfully discharged contrary to the terms of a [labor] contract." 312 U.S. at 632. That holding was premised on the notion that the RLA's arbitral procedures were intended "to be optional, not compulsory, and that therefore a State was free to accord an alternative remedy to a discharged railroad employee under its law of contracts." *Andrews*, 406 U.S. at 321-322. The Court in *Andrews* concluded that the premise of *Moore* "was never good history and is no longer good law." *Id.* at 322.

"disputes * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. 153 First (i).

The proper framework for evaluating the existence of a minor dispute is set forth in this Court's decision in *Conrail*. There, the Court addressed whether a dispute about the carrier's implementation of an employee drug testing program was a "major dispute" concerning a change in the collective bargaining agreement (subject to the RLA's bargaining and mediation provisions, see note 4, *supra*) or a "minor dispute" (subject to compulsory arbitration). In holding that the drug testing controversy was a minor dispute, the Court looked "to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." 491 U.S. at 305. As the Court explained, "[t]he distinguishing feature of such a case [*i.e.*, a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Ibid.*⁸

2. The holding by the Supreme Court of Hawaii that respondent's tort claims for retaliatory discharge are not minor disputes (Pet. App. 10a-20a) is supported by *Conrail*, because those claims cannot be "conclusively resolved" (491 U.S. at 305) by interpreting the collective bargaining agreement. Respondent's first claim—alleging retaliatory discharge in violation of public policy—requires proof that the termination "violate[d] a clear mandate of public policy." Pet. App. 20a-21a. As the Supreme Court of Hawaii explained, if HAL dismissed respondent in order to

⁸ The Court made plain that a party may not trigger the RLA's arbitral mechanism by asserting a contract right on "insubstantial grounds." *Conrail*, 491 U.S. at 306. When an employer asserts "a contractual right to take [a] contested action, the ensuing dispute is minor [only] if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 307.

punish him for trying to rectify an alleged safety infraction, that action would violate the policy "of the Federal Aviation Act and [implementing regulations] to protect the public from shoddy repair and maintenance practices." *Id.* at 21a.⁹ Respondent's second claim, which arises under the HWPB, also does not turn on the meaning of the collective bargaining agreement;¹⁰ it merely calls for proof that HAL discharged respondent because he reported the safety infraction to the FAA. *Id.* at 21a-22a.¹¹

⁹ Hawaii law makes the tort of wrongful discharge in violation of public policy available regardless of whether a worker is employed at-will or protected by a collective bargaining agreement. Pet. App. 20a-21a.

¹⁰ The HWPB provides that it should not be construed to diminish an employee's rights under a collective bargaining agreement, but that it shall "supersede and take precedence over the rights, remedies, and procedures provided in [such] agreements" if the rights and remedies are inferior. Haw. Rev. Stat. § 378-66(b) (1994).

¹¹ For an employee working in the railroad rather than the airline industry, a state law whistleblower claim may be preempted by the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. 431 *et seq.* The FRSA provides that common carriers by railroad "may not discharge or in any manner discriminate against any employee because such employee * * * has—(1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or (2) testified or is about to testify in any such proceeding." 45 U.S.C. 441(a). The FRSA contains an express preemption provision that would appear to preempt certain state whistleblower laws. See 45 U.S.C. 434; *Rayner v. Smirl*, 873 F.2d 60, 64-66 (4th Cir.), cert. denied, 493 U.S. 876 (1989).

The FRSA also provides that "[a]ny dispute, grievance, or claim arising under this section" is subject to the arbitral remedy provided by the RLA. See 45 U.S.C. 441(c)(1) (referring claims to arbitration under 45 U.S.C. 153). Petitioners argue (Br. 12-14) that the FRSA thus demonstrates Congress's intent to have whistleblower claims adjudicated under that arbitral mechanism. To the contrary, if retaliatory discharge claims in the railroad industry were generally preempted as "minor disputes" subject to Section 153 First (i), Congress would not have found it necessary to invoke the RLA's arbitral mechanism expressly in Section 441(c)(1).

Accordingly, as the state supreme court explained, the tort claims in this case turn on a factual dispute about whether HAL terminated respondent based on an impermissible motive—because he engaged in conduct protected by state tort law, independent of any contract rights of respondent or HAL. The collective bargaining agreement cannot eliminate such substantive legal protections provided to employees independent of the agreement. See *Buell*, 480 U.S. at 563-565; *Colorado Anti-Discrimination Comm'n*, 372 U.S. at 724. Moreover, the elements of the tort and contract claims and defenses are distinct. Respondent cannot prevail on his tort claims merely by proving that HAL lacked “just cause” to dismiss him under the collective bargaining agreement, because the torts alleged require proof of unlawful purpose to punish respondent for rectifying safety violations or reporting them to the FAA. Conversely, even if the state court were to find that respondent committed insubordination under the contract by refusing “to sign work records in connection with the work he performed” (Pet. App. 49a (Art. IV ¶ D.4(a))), that finding could not “arguably justif[y]” (*Conrail*, 491 U.S. at 307) a discharge motivated by the desire to penalize respondent for rectifying or reporting a safety infraction. Thus, the court below correctly determined that this case does not present a minor dispute subject to the RLA’s exclusive arbitral mechanism because “[respondent’s] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the agreement.” Pet. App. 19a.¹²

¹² Petitioners argue (Br. 34) in this Court that respondent’s claims are preempted because the state court must construe the collective bargaining agreement to determine if respondent was “discharged.” Petitioners have provided no basis, however, for concluding that the Hawaii tort of retaliatory discharge in violation of public policy or of

C. Neither The Text Nor The History Of The Railway Labor Act Supports The Broad Preemption Of State Tort Law Urged By Petitioners

Petitioners contend (Br. 26-27, 48-49) that *Conrail* does not supply the appropriate framework for evaluating RLA preemption. They argue (Br. 10-11) instead that the RLA’s compulsory arbitral mechanism—which applies to disputes “growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions,” 45 U.S.C. 153 First (i)—extends not merely to contract claims, but to any claim arising out of disciplinary action in an employment setting covered by the Act.

1. a. Contrary to petitioners’ argument (Br. 10-11), the language of Section 153 First (i) does not indicate that the class of “grievances” necessarily encompasses all claims touching upon the employment relationship, regardless of whether they are based on contractual rights. First, although the Act applies to disputes “growing out of grievances or out of the interpretation or application” of a collective bargaining agreement (45 U.S.C. 153 First (i) (emphasis added)), this Court has recognized that the word “or” is not necessarily disjunctive and that “or” does not always require that the phrases it separates be given independent meaning. See, e.g., *United States v. Olano*, 113 S. Ct. 1770, 1776-1777 (1993); *McNally v. United States*, 483 U.S. 350, 358-359 (1987).¹³ Second, although the term “grievance” might in theory be used more broadly, it is

the HWPAs depends on a finding of “discharge” as defined by the labor contract, rather than by state tort law.

¹³ See also *Webster’s Third New International Dictionary* 1585 (1986) (the word “or” may be used “to indicate * * * (3) the synonymous, equivalent, or substitutive character of two words or phrases <fell over a precipice [or] cliff> <the off [or] far side> <lessen [or] abate>; (4) correction or greater exactness of phrasing or meaning <these essays, [or] rather rough sketches> <the present king had no children—[or] rather no legitimate children * * * >”).

commonly used in the labor law context to refer to claims arising out of a collective bargaining agreement. See, e.g., *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (“[c]ollective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement”); 29 U.S.C. 173(d) (“Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”). Although there is inevitable overlap between the phrases separated by the “or” in Section 153 First (i) under any reading of that provision,¹⁴ this Court’s cases demonstrate that that is too slender a basis for construing the RLA to preempt all tort duties related to employment covered by the Act.¹⁵ See pp. 19-26, *infra*.

¹⁴ Petitioners have not identified any dispute growing out of the interpretation or application of a collective bargaining agreement that could not be treated as a “grievance.” Thus, even under petitioners’ construction of the RLA, Congress’s inclusion of a reference in Section 153 First (i) to disputes “growing out of grievances *or* out of the interpretation or application” of a labor contract would make one of the alternatives superfluous (emphasis added)).

¹⁵ Although the legislative history does not give a clear explanation of why the term “grievances” was included in Section 153 First (i), there is a plausible explanation for Congress’s decision to include additional language to make its intent unmistakable. As this Court has explained, a collective bargaining agreement “is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate,” and it “calls into being a new common law—the common law of a particular industry or of a particular plant.” *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960). The express terms of such agreements are thus inevitably supplemented by “practice, usage and custom.” *Conrail*, 491 U.S. at 311-312. Although claims based on practice or custom are appropriately regarded as an incident of the contractual relationship between the employer and union, inclusion of the term “grievances” in Section 153 First (i) serves to foreclose any contention that arbitration is unavailable for claims that are not based on the

b. Petitioners argue (Br. 15-16) that the legislative history of the RLA shows that the term “grievances” extends to workplace disputes outside the collective bargaining agreement. It is true that when the relevant language was first enacted in 1926, see Railway Labor Act, ch. 347, § 3(c), 44 Stat. 578, some Members of Congress made floor statements that could, in isolation, be read to suggest that the class of “grievances” is not coterminous with the class of disputes arising from the contract. See, e.g., 67 Cong. Rec. 4517 (1926) (Rep. Barkley) (referring to “disagreements over grievances, interpretations, discipline, and other technicalities”); *id.* at 8807 (Sen. Watson) (discussing “grievances” and observing that “[o]f this class, also, are disputes rising out of the interpretation or application of existing agreements”). Those stray remarks, however, are inconclusive. There were other floor statements (some by the same Members quoted above) that equated “grievances” with questions of contract interpretation, thereby foreclosing the assertion that the term “grievance” was generally understood to encompass extra-contractual disputes. See, e.g., *id.* at 4510 (Rep. Barkley) (“There are two sorts of disputes that arise on railroads. One kind is a dispute growing out of the interpretation of agreement[s] as to wage scales or working conditions that already exist. These disputes might be termed grievances.”); *id.* at 8808 (Sen. Watson) (noting that under previous law, “boards of adjustment * * *, as in this bill provided, had to do only with grievances—that is to say, with the interpretation and the application of existing agreements as to wages, hours of labor, and conditions of service”). Because the preemption of employment standards “within the traditional police power of the State[s]” “should not be lightly inferred,” *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987),

express terms of the collective bargaining agreement, but on the practice, usage, and custom of the workplace.

the inconclusive nature of the legislative materials surrounding the 1926 enactment of the RLA weighs heavily against fashioning a broad rule of preemption on the basis of those materials.

Moreover, when Congress amended the RLA in 1934 to make the arbitral mechanism compulsory for minor disputes, the accompanying House Report stated: "The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions." H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-3 (1934). Although there was little discussion of the meaning of minor disputes in 1934, the House Report indicates that at the point when Congress made the RLA's grievance machinery exclusive, the word "grievances" was considered synonymous with disputes growing out of collective bargaining agreements. See also Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 567 (1937) (describing function of NRAB as being to "render[] judicially enforceable decisions in controversies arising out of the interpretation of contracts"); National Mediation Board, First Ann. Rep. 25-26 (1935) (likening arbitration of minor disputes to interpreting business contracts).¹⁶ Finally, the legislative history of the RLA in

¹⁶ Petitioners argue that Congress's extension of the RLA to the airline industry in 1936 shows that the term "grievances" includes noncontractual claims. Specifically, petitioners rely on the statement in a House Report that boards of adjustment would be set up immediately under the 1936 amendments, even though there were as yet no collective bargaining agreements in effect in the airline industry. Br. 18 (discussing H.R. Rep. No. 2243, 74th Cong., 2d Sess. 1 (1936)). In fact, the House Report recognized that there would be a delay in the need for an arbitral mechanism precisely because of the absence of collective bargaining agreements. The 1936 Act, unlike the 1934 Act, did not immediately establish a national board of adjustment for the

general gives no indication that in providing for the arbitration of minor disputes, Congress ever intended the Act's arbitral machinery to displace independent state tort remedies for railroad and airline workers who sustain work-related injuries.

2. In any case, two related lines of this Court's precedents squarely foreclose petitioners' broad view of the preemptive force of the RLA. First, the Court has held that the trigger for the RLA's exclusive arbitral mechanism is the existence of a dispute that can be conclusively resolved by construing the contract, that is, a claim of legal right that can be established or defeated by provisions of the contract. Second, the Court has also held that the RLA does not preempt substantive regulation of

airline industry. See Act of Apr. 10, 1936, ch. 166, § 205, 49 Stat. 1190. Rather, as the House Report explained:

Under Title II a similar board [*i.e.*, one similar to the National Railroad Adjustment Board] is established to handle similar matters [*i.e.*, minor disputes] for air transportation * * *. This new adjustment board will be created and will function in the same manner as the railway board, excepting that it need not be established immediately but only when deemed necessary by the Mediation Board. *The reason for the permissive delay in its formation is that there is nothing for such a board to do until employment contracts have been completed, and there are no such contracts in operation now.*

H.R. Rep. No. 2243, *supra*, at 1 (emphasis added). Although the Act contemplated a more immediate establishment of system, group, or regional boards, "it was thought that temporary boards might be created under this power to settle individual disputes pending the time when the volume of disputes warranted the creation of a full-time board." *Ibid.* Thus, the 1936 House Report merely shows that the system, group, or regional adjustment boards were to be set up as needed to handle the same disputes that would ultimately be handled by the national board. In any case, even if Congress believed that there might be some form of precontractual disputes arising out of (and defined by) the employment relationship that could be submitted to arbitration, that does not support the further conclusion that boards of adjustment in 1936 were charged with handling state law tort claims.

the railroad and airline industries or foreclose the application of tort remedies to enforce those substantive standards.

a. As explained above, this Court in *Conrail* held that the “distinguishing feature” of a minor dispute “is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement.” 491 U.S. at 305. Petitioners argue (Br. 48-49) that *Conrail* is not determinative here because its test was articulated in the context of distinguishing a “major dispute” from a “minor dispute” under the Act, and not in the context of deciding what constitutes a “minor dispute” for purposes of the preemption of remedies outside the Act. Petitioners’ asserted distinction, however, does not withstand analysis. As discussed above (see pp. 10-11, *supra*), the basis for preemption under the RLA is that minor disputes are channeled to an exclusive arbitral process that allows only limited avenues for judicial review. It follows that the preemption inquiry necessarily turns on the same question that was addressed in *Conrail*—whether the case presents a dispute “growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions,” 45 U.S.C. 153 First (i). There is no basis for construing the same terms differently here. Cf. *Ratzlaf v. United States*, 114 S. Ct. 655, 660 (1994) (a single statutory phrase should be read “the same way each time it is called into play”).

Further, this Court’s analysis in *Andrews* confirms that the test for preemption turns on whether the state law claim asserted by a railroad employee is based on the collective bargaining agreement. As pointed out in note 7, *supra*, the Court in *Andrews* overruled its decision in *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941), and held that the RLA’s exclusive arbitral mechanism pre-empts alternative state law remedies for minor disputes. In so doing, the Court rejected Andrews’ argument that his claim (that his employer improperly refused to

reinstate him after an automobile accident) was saved from preemption because Andrews had styled it a “wrongful discharge” claim. The Court explained (406 U.S. at 324):

Here it is conceded by all that the only source of [Andrews’] right not to be discharged, and therefore to treat an alleged discharge as a “wrongful” one that entitles him to damages, is the collective-bargaining agreement * * *. [The employer] in this case vigorously disputes any intent on its part to discharge [Andrews], and the pleadings indicate that the disagreement turns on the extent of [its] obligation to restore [Andrews] to his regular duties following injury in an automobile accident. The existence and extent of such an obligation in a case such as this will depend on the interpretation of the collective-bargaining agreement. Thus [Andrews’] claim, and the [employer’s] disallowance of it, stem from differing interpretations of the collective-bargaining agreement. * * * His claim is therefore subject to the Act’s requirement that it be submitted to the Board for adjustment.

If the exclusive arbitral mechanism of the RLA applied to any work-related claim, irrespective of its basis in the contract, then the Court’s analysis tying Andrews’ claim to the contract would have been entirely unnecessary; it would have been sufficient to note that Andrews’ claim arose out of a potentially grievable employment dispute subject to the RLA. But given the Court’s extensive analysis establishing that the “source of [Andrews’] claimed] right not to be discharged[] * * * [was] the collective-bargaining agreement” (406 U.S. at 324), the contractual nature of the claim was necessarily a crucial factor in the Court’s finding preemption.¹⁷

¹⁷ See also, e.g., *Pittsburgh & L.E. R.R.*, 491 U.S. at 496 n.4 (minor disputes “are those involving the interpretation or application of existing contracts”); *Chicago R. & I. R.R.*, 353 U.S. at 33 (minor

b. In a closely related line of cases, this Court has also held that the RLA does not preclude enforcement of claims based on substantive regulatory guarantees that operate independently of the collective bargaining agreement. In *Atchison, T. & S.F. Ry. v. Buell*, *supra*, the Court rejected the contention that a personal injury claim brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, was barred by the RLA because the alleged workplace defects giving rise to his FELA claim might also have been the proper subject of grievance procedures as a minor dispute. The Court recognized that the railroad's duty to use reasonable care "was recognized at common law, * * * is given force through the [FELA] * * *, and is confirmed in some, if not all, collective-bargaining agreements." 480 U.S. at 558.¹⁸ But it rejected the argument that Buell's tort claim was barred simply because the alleged injury arose from conduct "that may have been subject to arbitration under the RLA." *Id.* at 564. The Court reasoned that "notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" *Id.* at 565. It added that the FELA "not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the

disputes are "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation"); *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 243 (1950) (arbitral mechanism is meant "to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements").

¹⁸ In fact, Buell had taken "preliminary though abortive steps" to invoke the grievance machinery. 480 U.S. at 564.

Adjustment Board." *Ibid.* Buell therefore confirms that when a cause of action is based on substantive rights independent of the collective bargaining agreement, it is not preempted by the RLA even if parallel claims could also have been brought as minor disputes under the RLA.¹⁹

The result in *Buell*, moreover, is supported by this Court's prior decisions holding that the RLA does not preempt the States from regulating the working conditions of employees subject to the Act. For example, in *Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen*, *supra*, the Court sustained the Illinois Commerce Commission's order requiring railroads to place cabooses on their trains as a safety measure for the protection of switchmen who performed their duties at the back of

¹⁹ Petitioners suggest (Br. 46 n.28) that *Buell* is inapposite because it reconciled the RLA with another federal statute, rather than with state law. The Court, however, emphasized that the FELA provides "substantive protection * * * independent of the * * * collective-bargaining agreement" (480 U.S. at 565); it did not suggest that a different result would obtain with respect to a state law that similarly provided independent substantive protection to an employee. In any event, other decisions of this Court confirm that Congress did not intend the RLA's grievance machinery to preempt all state regulation of the railroad and airline employment. See pp. 23-26, *infra*.

Buell also undermines petitioners' reliance (Br. 23-24) on the following dicta in *Burley*, 325 U.S. at 723: a minor dispute "relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries." In our view, the Court's reference to an "omitted case" is properly understood as drawing a contrast with a dispute relating to a "particular provision" of the labor contract. An "omitted case," in other words, is a case that arises not from the express terms of the contract, but by implication from practice, usage, or custom. See note 15, *supra*. Buell now makes clear that the mere possibility of bringing a grievance on an "omitted case" such as a "claim[] on account of personal injur[y]" (*Burley*, 325 U.S. at 723) does not preempt a separate tort action based on a standard of care independent of the agreement.

moving trains. In so holding, the Court rejected the argument that the state commission's order was preempted by the RLA because the demand for cabooses arose from a dispute between the carrier and its employees, and because the collective bargaining agreement itself contained a provision dealing with the provision of cabooses. The Court "assume[d], without deciding, that the demand for additional caboose service and its refusal constitute a dispute about working conditions, and that the National Railroad Adjustment Board would have jurisdiction of it on petition of the employees or their representatives and might have made an award such as the order in question or some modification of it." 318 U.S. at 6. But the Court reasoned as follows (*id.* at 6-7 (emphasis added)):

State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. * * * We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which would be of federal concern. *But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question.*

Similarly, in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, *supra*, the Court rejected the contention that the RLA preempted a state statute "protecting employees against racial discrimination."

372 U.S. at 724.²⁰ As this Court emphasized, "[n]o provision in the [RLA] even mentions discrimination in hiring," and nothing in the Act "suggests that [it] places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices." *Ibid.* Because the RLA "has never been used for that purpose," this Court found that it did not preempt the state anti-discrimination statute there at issue. *Ibid.*

In light of *Buell*, *Terminal R.R. Ass'n*, and *Colorado Anti-Discrimination Comm'n*, the compulsory arbitration provisions of the RLA do not preempt claims premised on state law duties in areas of legitimate state concern that are independent of duties assumed under the collective bargaining agreement.²¹ Given the breadth of the subject matter covered by a typical collective bargaining agreement,²² petitioners' construction of the RLA

²⁰ Petitioners suggest (Br. 47-48) that *Colorado Anti-Discrimination Comm'n* is inapposite here because it involved discrimination against prospective employees, and not against incumbents. Nothing in the Court's reasoning, however, suggests that the principle of the case is so limited.

²¹ Those decisions foreclose petitioners' reliance (Br. 10) on 45 U.S.C. 152 First, which requires carriers and employees "to exert every reasonable effort * * * settle all disputes, whether arising out of the application of * * * agreements or otherwise." *Ibid.* That provision—which is phrased more broadly than the operative language of Section 153 First (i)—may refer to both major and minor disputes. But even if Section 152 First is read to require the parties (independent of the major dispute mechanism) to try to settle certain issues arising out of the employment relationship but not specifically addressed by the agreement, the decisions discussed in text make clear that Section 153 First (i) of the RLA does not preempt claims based on independent tort duties, rather than on the collective bargaining agreement.

²² A collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *Warrior & Gulf Navigation Co.*, 363 U.S. at 578-579 (citation omitted; emphasis added). For that reason, a vast array of injuries sustained by railroad

would result in a wholesale preemption of state tort law as it applies to employment relationships covered by the RLA. But because "the text of the RLA does not * * * deal with the subject of tort liability" (*Buell*, 480 U.S. at 562), or display any intent to preempt "the field of regulating working conditions themselves" (*Terminal R.R. Ass'n*, 318 U.S. at 7), the RLA should not be construed to preempt States from adopting minimum duties, independent of the collective bargaining agreement, through their law of torts,²³ even if those duties pertain to employees covered by the RLA.²⁴

workers could theoretically be addressed by "the timely invocation of the grievance machinery." *Buell*, 480 U.S. at 564.

²³ That conclusion is supported not only by this Court's decisions construing the RLA in particular, but also by general principles of labor law preemption, which counsel against construing federal statutes to displace the police power of the States. See, e.g., *Fort Halifax Packing*, 482 U.S. at 21, 23 (preemption "should not be lightly inferred," because "establishment of labor standards falls within the traditional police power of the State[s]" and "does not impermissibly intrude upon the collective-bargaining process"); *Lueck*, 471 U.S. at 212 (avoiding interpretation that "would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored").

²⁴ Petitioners argue (Br. 35) that their claim of preemption is buttressed by *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1651-1657 (1991), which held that an agreement to arbitrate claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, may be judicially enforced. Petitioners contend that *Gilmer* shows that parties may by contract provide for the arbitration of independent claims of statutory right, and that RLA preemption would extend to any such claims brought within the scope of a collective bargaining agreement. For two reasons, *Gilmer* does not assist petitioners here. First, the Court in *Gilmer* took pains to distinguish this Court's prior decisions holding that the arbitration of contract claims does not preclude subsequent judicial resolution of independent statutory claims. Second, the claim in *Gilmer* was subject to the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, and the Court specifically relied on a provision of that Act, 9 U.S.C. 2, making compulsory arbitration clauses enforceable. 111 S. Ct. at 1651, 1657. In contrast,

D. This Court's Decisions Construing Section 301 Of The Labor-Management Relations Act Support The Conclusion That Respondent's Tort Claims Are Not Preempted

Petitioners contend (Br. 39-43) that the Supreme Court of Hawaii erred in relying on *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1986), a case arising under Section 301(a) of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185(a). In our view, however, *Lingle* affords an appropriate framework for addressing the preemption question under the RLA.

Section 301(a) of the LMRA confers jurisdiction on the federal district courts of "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act], or between any such labor organizations." 29 U.S.C. 185(a). Under this Court's decisions, disputes requiring the interpretation of labor contracts covered by Section 301 are governed by federal common law rules that preempt state rules of decision. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). In *Lingle*, the Court addressed the extent to which preemption under Section 301 extends to tort claims arising out of the employment relationship.

Specifically, the Court in *Lingle* held that Section 301 did not preempt a state tort suit based on retaliatory discharge for filing a worker's compensation claim. Noting that the elements of the state law cause of action consisted of (1) dismissal of an employee and (2) a motive to deter or interfere with his filing of a worker's compensation claim, the Court concluded:

the Federal Arbitration Act explicitly provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. Hence, it has no application here.

Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge * * *; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement.

486 U.S. at 407. The Court accordingly found that the state tort was "independent of the collective-bargaining agreement" because its resolution did "not require construing [that] * * * agreement." *Ibid.* (emphasis added).²⁵

To be sure, the standard for preemption under *Lingle* (whether a state law claim requires interpretation of a labor contract) is articulated somewhat differently from the standard for finding a minor dispute under *Conrail* (whether a dispute may be conclusively resolved by interpreting the collective bargaining agreement). It is also true that the RLA, unlike the LMRA, affirmatively calls for the arbitration of contract claims within its sweep.²⁶ Nevertheless, *Lingle* is instructive in the RLA

²⁵ The Court in *Lingle* emphasized that "even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 purposes." 486 U.S. at 409-410 (footnote omitted).

²⁶ This distinction between the RLA and the LMRA should not be overstated. In determining when a state tort action is preempted under Section 301, the Court confronted the need to "preserve[] the central role of arbitration in our 'system of industrial self-government.'" *Lueck*, 471 U.S. at 219. It noted that the "need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's [preemption] holding in *Lucas Flour*," and that the standard for LMRA preemption must protect the parties' "federal right to decide who is to resolve contract disputes." *Ibid.* Thus, although RLA preemption

context. This Court has explained that a central purpose of both Section 301 and the exclusive arbitral mechanism of the RLA is to promote the uniform interpretation of collective bargaining agreements and the peaceful, consistent resolution of labor-management disputes. Compare, e.g., *Lingle*, 486 U.S. at 404, 406, and *Lueck*, 471 U.S. at 209-210, with *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 242-243 (1950).

Not surprisingly, therefore, in its decision in *Andrews*, this Court relied on its precedents under Section 301 of the LMRA in holding that the arbitral mechanism of the RLA preempts state law judicial remedies for claims arising out of a collective bargaining agreement. See 406 U.S. at 323; see also *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963) ("the [RLA] contract, like the [LMRA] § 301 contract, is a federal contract * * * governed and enforceable by federal law"). By the same token, in its decision in *Lingle*, the Court specifically relied on its RLA decision in *Buell* in determining that a state law retaliatory discharge claim was not preempted by Section 301 because it did not require interpretation of the collective bargaining agreement. See 486 U.S. at 410-411.

In short, the question addressed under the RLA and LMRA preemption cases is common to both statutes: how to accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interest of the States in adopting standards of conduct for employers subject to their police power. Under the RLA, as under the LMRA, a proper accommodation of those interests leads to the conclusion that a state tort law claim for retaliatory discharge is not preempted.²⁷

protects a direct statutory right to arbitration, LMRA preemption protects the important statutory right to contract for an arbitral remedy.

²⁷ Compare, e.g., *Lingle*, 486 U.S. at 409 (LMRA "says nothing about the substantive rights a State may provide to workers when

CONCLUSION

The decision of the Supreme Court of Hawaii should be affirmed.

Respectfully submitted.

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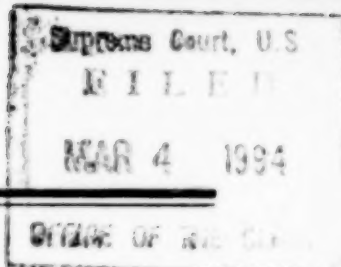
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APRIL 1994

adjudication of those rights does not depend upon the interpretation of [labor] agreements”), and *Lueck*, 471 U.S. at 212 (LMRA “does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law,” and does not preempt “state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract”), with *Colorado Anti-Discrimination Comm’n*, 372 U.S. at 724 (RLA does not preempt state anti-discrimination law). We therefore agree with those lower court decisions holding that *Lingle* offers an appropriate framework for analyzing RLA preemption of state law tort actions. See, e.g., *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993) (applying *Lingle*); *Davies v. American Air Lines, Inc.*, 971 F.2d 463, 466-467 (10th Cir. 1992) (same), cert. denied, 113 S. Ct. 2439 (1993); *O’Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 4 (1st Cir. 1992) (same), cert. denied, 113 S. Ct. 980 (1993); *Maher v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750, 758 (N.J. 1991) (same). But see, e.g., *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1097 (9th Cir. 1991) (*Lingle* does not govern in RLA cases); *Lorenz v. CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (same).

No. 92-2058



IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC., *et al.*,
Petitioners,

v.

GRANT T. NORRIS,
Respondent.

On Writ of Certiorari to the Supreme Court
for the State of Hawaii

BRIEF OF
THE NATIONAL RAILWAY LABOR CONFERENCE
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Dated: March 4, 1994

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INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association that includes almost all of the nation's Class I railroads, employing more than 90% of all railroad employees, among its members. The Conference represents member railroads in multi-employer collective bargaining with unions pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and in regard to other labor-management relations matters that affect the railroads generally. Among other things, it assists and advises member railroads in connection with the mandatory system of arbitral remedies established by the RLA for settling disputes arising out of workplace grievances.

This case presents important questions concerning the scope of the adjustment system established by the Railway Labor Act. The decision below, which permits a dissatisfied employee to bypass the Act's grievance processes and instead bring suit in state court, subverts Congress's expressed and oft-repeated intent to create a comprehensive, mandatory, and exclusive system for resolving a broad range of workplace disputes without judicial intervention. Congress firmly believed that arbitration of such disputes is critical to peaceful labor-management relations in inherently interstate transportation industries. The Conference thus has a vital interest in ensuring that the adjustment procedures established by the RLA are not circumvented or undercut. Accordingly, the Conference files this brief as *amicus curiae* in support of the petitioners.¹

SUMMARY OF ARGUMENT

I. A. The Railway Labor Act provides comprehensive procedures for resolving so-called "minor" disputes in the rail and airline industries. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945). "Minor" disputes are those

¹ This brief is being filed with the written consent of all parties pursuant to Supreme Court Rule 37.3.

that "grow[] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. § 153 First (i), and are subject to mandatory and exclusive arbitration before RLA adjustment boards. "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978).

The plain language of the RLA defines the minor dispute category expansively. It expressly states that the Act is designed "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements," 45 U.S.C. § 151a (emphasis added), and commits such disputes to RLA arbitration. *Id.* §§ 153 First (i), 153 Second. This broad definition carries out Congress's intent of having rail and airline labor disputes resolved by individuals "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist" in those industries. *Gunther v. San Diego & A.E. Ry.*, 382 U.S. 257, 261 (1965) (citation omitted). See pp. 6-9, *infra*.

B. The relevant legislative history confirms Congress's desire to encompass a broad range of grievances arising out of the employment relationship within the RLA's mandatory arbitral processes. Sponsors of the original 1926 legislation stated that the adjustment boards were designed to consider, *inter alia*, "grievances . . . of a personal nature," as well as "disputes rising out of the interpretation and application of existing agreements." See pp. 9-12, *infra*.

C. This Court's decisions confirm the RLA's plain language and legislative history showing that the RLA's mandatory dispute resolution procedures apply broadly to disputes arising out of the employment relationship. In *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989) ("*Conrail*"), quoting its decision in *Burley*, this Court again recognized that a minor dispute "relates either to the meaning or proper

application of a particular provision *or* to an omitted case" in which "the claim is founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement.*" 491 U.S. at 303 (emphasis added). This Court's decisions also make clear that the RLA procedures applicable to such disputes are not "optional, to be availed of as the employee or the carrier chooses." *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 322 (1972). See pp. 12-14, *infra*.

D. With respect to "whistleblower" claims of the type at issue here, Congress has expressly manifested its intention that such disputes be channeled to RLA arbitration. The Federal Railroad Safety Act, 45 U.S.C. § 431 *et seq.*, provides that a railroad may not "discharge or in any manner discriminate against" an employee who has reported a safety violation, *id.* § 441(a), and that "any dispute, grievance, or claim arising under this section" must be resolved through the RLA grievance process. *Id.* § 441(c). The legislative history of the FRSA makes clear that the statute did not *add* to the scope of the disputes that were already subject to mandatory RLA arbitration in the rail and airline industries; rather, Congress recognized that employees could "seek similar protection through normal grievance procedures" under "current law," *i.e.*, the RLA. RLA arbitrators have adjudicated retaliatory discharge disputes. The Fourth Circuit has recognized that Congress's provision of an arbitral remedy for these types of retaliatory discharge and discipline claims leaves no room for state-law tort suits based thereon. *Rayner v. Smirl*, 873 F.2d 60, 64-66 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989). See pp. 14-17, *infra*.

II. A. Although the Hawaii Supreme Court understood that "arbitration is the exclusive remedy for claims arising from minor disputes," Pet. App. 12a, it misread this Court's decision in *Conrail* as restricting the category of arbitrable minor disputes to those that "may be conclusively resolved by interpreting the existing . . . agree-

ment," Pet. App. 14a (quoting *Conrail*, 491 U.S. at 305). The quoted language from *Conrail* did not concern RLA preemption of laws outside the RLA, as the Hawaii Supreme Court concluded; instead, that language related only to the *internal* RLA question of what RLA dispute resolution procedures would apply when a carrier claims a contractual right to take an action and the union claims that the action constitutes a change in an existing agreement. Thus the context of the quoted language was a sentence which stated that "the distinguishing feature of *such a case* is that the dispute may be conclusively resolved by interpreting the existing agreement." 491 U.S. at 305. By contrast, that portion of *Conrail* which spoke to the scope of the RLA in its entirety recognized that the minor dispute category extends broadly to cover disputes "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement." *Id.* at 303 (quoting *Burley*, 325 U.S. at 723). See pp. 17-20, *infra*.

B. The Hawaii Supreme Court was wrong to conclude that the standard for preemption of state law under the RLA is "virtually indistinguishable" from the rule for preemption under the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-188, in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). First, whereas the LMRA declares arbitration to be "the desirable method" for settling "disputes over the application or interpretation of an existing collective-bargaining agreement," 29 U.S.C. § 173(d), the category of arbitrable minor disputes under the RLA extends to grievances in addition to disputes over interpretation and application of agreements. Moreover, under the RLA arbitration is not just a "desirable method" for resolving labor disputes, but rather is mandated by Congress as the sole and exclusive means of resolving such disputes. Thus this Court has held that "the case for insisting on resort to [RLA arbitration] remedies is if anything stronger in cases arising under the [RLA] than it is in cases arising under . . .

the LMRA." *Andrews*, 406 U.S. at 323. While there is a split among the lower courts, the majority—including the Fourth, Sixth, Seventh, and Ninth Circuits—have recognized these differences between the RLA and LMRA and have refused to import the *Lingle* rule into the RLA context. See pp. 21-24, *infra*.

C. Recognition that the scope of RLA mandatory arbitration extends more broadly than just disputes over interpretation or application of collective agreements would not, as the Solicitor General's *amicus* brief contends (at 12), result in "an unduly broad preemption of state tort law." First, because preemption turns on Congress's intent, *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963), and because Congress intended the RLA to reach more broadly than the LMRA, the resulting impact on state law cannot be deemed "undue." Second, RLA preemption of state retaliatory discharge claims would not be undue, and the cases cited by the Solicitor General for a contrary proposition are inapposite. See pp. 25-28, *infra*.

D. The rule advanced by the Hawaii Supreme Court would contravene the policies that led Congress to channel minor disputes to arbitration. First, by making preemption turn on fine points of substantive state tort law in inherently interstate industries, the rule would jeopardize uniformity and consistency in the resolution of railroad and airline grievances. See, e.g., *Magerer v. John Sexton & Co.*, 912 F.2d 525, 529 (1st Cir. 1990) (finding that retaliatory discharge claims are preempted under Massachusetts law but not Illinois law). Second, the rule undermines the integrity of the RLA by allowing employees to artfully plead state tort claims and thereby "make an end run . . . avoiding the carefully crafted procedures set forth in the RLA." *DeTomaso v. Pan Am. World Airways, Inc.*, 733 P.2d 614, 621 (Cal. 1987), *cert. denied*, 484 U.S. 829 (1987). See pp. 29-30, *infra*.

ARGUMENT

I. THE RAILWAY LABOR ACT GIVES ADJUSTMENT BOARDS EXCLUSIVE JURISDICTION TO RESOLVE DISPUTES GROWING OUT OF THE EMPLOYMENT RELATIONSHIP BETWEEN CARRIERS AND EMPLOYEES.

A. Statutory Language.

The Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, governs employer-employee disputes in the rail and airline industries. It provides comprehensive procedures for peacefully resolving what are commonly referred to as "major" and "minor" disputes in accordance with the terminology adopted in *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945), thereby avoiding interruptions of critically important segments of the Nation's interstate commerce.

The RLA's "major-dispute" procedures apply to "intended change[s] in agreements affecting rates of pay, rules, or working conditions." 45 U.S.C. § 156. The RLA provides that a carrier or union seeking to effect such a change must first serve notice on the other party, and that if agreement cannot be reached, the parties must exhaust a lengthy process of collective bargaining and mediation, followed, at the discretion of the President, by investigation and recommendations by an emergency board. See *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

Minor disputes are those that "grow[] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153 First (i). If not settled by agreement of the parties, these disputes are resolved through arbitration before the National Railroad Adjustment Board ("NRAB") permanently established by § 3 First or before alternative adjustment boards created pursuant to § 3 Second. The RLA provides for appointment of a neutral board member to break deadlocks. 45 U.S.C.

§§ 153 First (f), 153 Second.² Employees have the right to be heard in grievance arbitration "either in person, by counsel, or by other representatives, as they may respectively elect," 45 U.S.C. § 153 First (j), and to proceed with their grievances on an individual basis even over the objection of the union. *Burley*, 325 U.S. at 740-41 & n.39. Consistent with the purposes of the RLA, unions and employees are prohibited from striking over a minor dispute, either before or after the decision by an adjustment board.³

This Court has repeatedly held that the jurisdiction of these adjustment boards to arbitrate minor disputes is exclusive and that courts lack subject-matter jurisdiction to decide the merits of any minor dispute.⁴ Apart from limited statutory grounds for judicial review of arbitration awards, 45 U.S.C. § 153 First (p) and (q), the RLA makes no provision for judicial involvement in resolving minor disputes. In short, "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and *out of the courts.*" *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added) (citation omitted).

The RLA's language makes clear that the mandatory and exclusive minor dispute resolution procedures are not limited simply to claims "growing out of" the "interpretation or application" of collective bargaining agreements—an expansive category in itself—but also include claims "growing out of grievances." 45 U.S.C. § 153 First (i). Indeed, the RLA makes clear that one of its central

² In the airline industry, minor disputes are resolved by adjustment boards established by the airline and the unions. 45 U.S.C. § 184. These boards are similar to the alternative adjustment boards established under § 3 Second, including provision for neutral members.

³ *E.g.*, *Brotherhood of R.R. Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30 (1957) (before); *Brotherhood of Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33 (1963) (after).

⁴ *E.g.*, *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972); *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239 (1950).

purposes is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a (emphasis added). The broad range of disputes covered by the RLA is further evidenced by § 2 First of the Act, which requires carriers and their employees to "settle *all* disputes, whether arising out of the application of such [collective bargaining] agreements *or otherwise . . .*" 45 U.S.C. § 152 First (emphasis added). Thus, as this Court recognized nearly fifty years ago and confirmed in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989) ("*Conrail*"), the RLA covers not only claims that implicate the terms of written or implied collective agreements, but also claims that are "founded upon *some incident of the employment relation . . . independent of those covered by the collective agreement.*" *Conrail*, 491 U.S. at 303 (quoting *Burley*, 325 U.S. at 723) (emphasis added).⁵

⁵ *Conrail* affirmed, as the lower courts have long held, that collective bargaining agreements under the RLA "may include implied, as well as express, terms." 491 U.S. at 311. Thus, disputes over the "interpretation or application of agreements," as that language is used in § 3 of the RLA, may relate to terms implied from past practices as well as express agreement terms. Disputes "growing out of grievances," as that term also appears in § 3, relate to "incident[s] of the employment relation" other than those covered by implied or express agreements. See also pp. 9-10, *infra*. Because most disputes will in one way or another involve interpretation or application of implied terms, if not express ones, relatively few disputes fall within the residual category of "grievances." That does not mean that such disputes are something other than minor disputes, however. Accordingly, the lower courts have generally recognized that both interpretation/application disputes and other grievances are minor disputes, as this Court recognized in *Burley* and *Conrail*. See, e.g., *Lorenz v. CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992); *Air Line Pilots Ass'n v. Eastern Air Lines, Inc.*, 863 F.2d 891, 898-99 (D.C. Cir. 1988); *Railway Labor Executives Ass'n v. Atchison, T. & S.F. Ry.*, 430 F.2d 994, 996-97 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971). *Davies v. American Airlines, Inc.*, 971 F.2d 463, 467-68 (10th Cir. 1992),

This broad definition of minor disputes is compelled not only by the statutory language but also by the policies that led Congress to create "expert administrative Board[s]" familiar with "specialized" industry custom and practice and railroad and airline collective bargaining agreements. *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551, 553 (1959).⁶ Thus, Congress provided for mandatory arbitration of workplace grievances by "representatives of management and labor . . . peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world." *Gunther v. San Diego & A.E. Ry.*, 382 U.S. 257, 261 (1965) (citation omitted); see also *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 243 (1950) (board members "understand railroad problems and speak the railroad jargon"; "[l]ong and varied experiences have added to the Board's initial qualifications").

B. Legislative History.

The legislative history of the RLA confirms Congress's intent to encompass within its scope all disputes growing out of the employment relationship between rail and air carriers and their employees. The RLA was originally enacted in 1926. 44 Stat. 577. During the debates on the 1926 legislation, minor disputes were sometimes characterized by its sponsors as involving the interpretation of existing labor agreements, in order to contrast them with "major disputes," *i.e.*, disputes over the formation of such agreements (which are subject to different RLA

cert. denied, 113 U.S. 2439 (1993), is to the contrary, but that court—like the Hawaii Supreme Court—was under what we believe to be the mistaken impression that *Burley's* broader definition had been "overruled by *Conrail*." See pp. 17-20, *infra*.

⁶ As this Court has observed, "The railroad world is like a state within a state. Its population . . . has its own customs and its own vocabulary, and lives according to rules of its own making." *Whitehouse v. Illinois Cent. R.R.*, 349 U.S. 366, 371 (1955) (quoting Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568-69 (1937)).

processes).⁷ But the same speakers emphasized that minor disputes were not limited solely to contractual questions. To the contrary, as explained by Representative Barkley, one of the supporters of the House bill, the adjustment boards were designed to consider "disagreements over grievances, interpretations, discipline, and other technicalities that arise from time to time in the workshop and out on the tracks in the operation of the roads." RLA Leg. Hist. 210, *supra* note 7. Similarly, Senator Watson, a proponent of the Senate bill, stated that minor disputes include "what are ordinarily called grievances" (which could be "of a personal nature" and involve a "great many employees," "a few employees," or "but one employee"), and "also, . . . disputes rising out of the interpretation and application of existing agreements as to wages, hours of labor, or working conditions." *Id.* at 477 (emphasis added). In short, from the very beginning Congress intended the full range of disputes arising "in the workshop and out on the tracks"—even if "of a personal nature" and involving but a single person (and not involving interpretation or application of an express or implied agreement)—to be subject to the regime of the RLA.

The legislative history also confirms Congress's purposes for channeling such a broad range of disputes to the adjustment processes. First, Congress wanted disputes to be resolved by individuals who "understand the problems by reason of their technical knowledge of the industry." RLA Leg. Hist. at 176 (statement of Rep. Cooper). Second, Congress adopted the position, which was urged by both the unions and the railroads, that the absence of outside interference in resolving these disputes was the means "best adapted to maintain satisfactory relations between

⁷ See, e.g., Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended (1926 through 1966) 192, 205, 480 (Comm. Print 1974) [hereinafter cited as "RLA Leg. Hist."] (statements of Rep. Barkley and Sen. Watson).

employers and employees." ⁸ As Representative Barkley explained, "[t]he history of railroading in this country has demonstrated that the most satisfactory method of adjustment of *all railroad disputes involving labor and working conditions* has been when . . . both sides were permitted to sit down at a table and settle their own disputes without interference from the outside." RLA Leg. Hist. at 194 (emphasis added).⁹

Finally, the legislative history surrounding amendments to the Act in 1934 and 1966 reaffirm Congress's intent to insulate disputes between carriers and employees from outside interference. The 1934 amendments were designed to make the grievance-resolution process more effective by creating a permanent NRAB (whereas before the Act provided for boards by agreement, which was not always possible, see *Burley*, 325 U.S. at 725-26), and by establishing a procedure for breaking deadlocked votes (which had led to a backlog of unresolved claims, see *Union Pac. R.R. v. Price*, 360 U.S. 601, 611-12 (1959)). These two amendments were advocated strongly by the unions, whose leaders made clear that "[t]he employees were willing to give up their remedies outside of the statute provided that a workable and binding statutory scheme was established to settle grievances." *Union Pac. R.R. v. Price*, 360 U.S. at 613 (emphasis added).¹⁰ Likewise,

⁸ H.R. Rep. No. 328, 69th Cong., 1st Sess. (1926), RLA Leg. Hist. at 48; S. Rep. No. 606, 69th Cong., 1st Sess. (1926), RLA Leg. Hist. at 102.

⁹ That this mandate extended beyond the realm of simply interpreting contracts is evident in the comments of Rep. Crosser, who said that adjustment boards would, along with the other boards established under the Act, "serve in a manner as courts to determine who is right and who is wrong, what is just and what is unjust, in disputes between railroads and their employees," and thus prevent them from becoming "tyrants" over each other. RLA Leg. Hist. at 344.

¹⁰ To be sure, and as pointed out by the Solicitor General's *amicus* brief last Term in *American Airlines, Inc. v. Davies* (No. 92-1077), *cert. denied*, 113 S. Ct. 2439 (1993) (at 6 n.5), the legislative history to the 1934 amendments does include a statement in a discussion of a non-related issue in a House Report that the

when the Act was amended in 1966 to incorporate a narrow standard for judicial review of arbitration awards, labor unions again offered vigorous support because, as one union spokesman explained, "[i]f the objectives of speedy, fair, and simplified handling and settlement of contract claims and grievances in this industry are to be achieved, it will be done by reducing to a minimum, rather than by expanding, the role of the courts in the field."¹¹

C. Supreme Court Cases.

This Court's decisions confirm what the RLA's language and purpose compel—that the scope of the Act's coverage, and hence of its mandatory arbitral processes, extends beyond disputes over the interpretation of labor agreements to encompass all varieties of workplace grievances arising out of the employment relationship. In its landmark *Burley* decision, this Court stated that "so-called minor disputes" involve "grievances . . . which

bill "provide[s] sufficient and effective means for the settlement of minor disputes known as 'grievances,' which develop from the interpretation and/or application of the contracts between labor unions and the carriers, fixing wages and working conditions." H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-3 (1934). That single statement, however, cannot justify equating "grievances" with contract interpretation disputes in a way that deprives the statutory reference to "grievances" of all meaning, contrary to the many statements by the Act's original sponsors, set forth above, making clear that the statutory coverage of disputes "arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" was meant to encompass a broader class of disputes than just those arising from interpretation or application of collective agreements. Indeed, the 1934 House Report stated as to section 2, which incorporated the above-quoted statutory language, that "[t]he bill does not introduce any new principles into the existing Railway Labor Act." *Id.* at 2, 6.

¹¹ *Railway Labor Act Amendments Relating to NRAB: Hearings on H.R. 701, H.R. 704, and H.R. 706 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 89th Cong., 1st Sess. 262 (1965) (statement of Jesse Clark on behalf of Railway Labor Executives' Association).*

inevitably appear in the carrying out of [collective bargaining] agreements and policies or arise incidentally in the course of an employment," including claims "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement." 325 U.S. at 723-24. This Court has also held that the NRAB "was established as a tribunal to settle disputes arising out of the relationship between carrier and employee, and that "[t]he purpose of the Act is fulfilled if the claim itself arises out of the employment relationship." *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551-52 (1959) (emphasis added). And this Court has stated that "minor disputes" cover the broad range of "grievances that arise daily between employees and carriers regarding rates of pay, rules, and working conditions." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978).

Most recently in *Conrail*, this Court pointed out that "the minor dispute category is predicated on § 2 Sixth and § 3 First (i) of the RLA, which set forth conference and compulsory arbitration procedures for a dispute arising or growing 'out of grievances or out of the interpretation or application of [collective bargaining] agreements.'" 491 U.S. at 303. Quoting *Burley*, the Court explained that a minor dispute "relates either to the meaning or proper application of a particular provision . . . or to an omitted case" in which "the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement." *Id.* (emphasis added).

This Court's decisions also make clear that if a dispute is a minor dispute, then RLA arbitration is the exclusive remedy and resort to a judicial forum—including under state law—is foreclosed. This Court has specifically found in the RLA "a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 244 (1950) (emphasis added). As the Court held in *Pennsylvania R.R. v. Day*, 360 U.S. at 553, "not to respect the cen-

tralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act." And in *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972), then-Justice Rehnquist, writing for a majority of the Court, held that an employee could not bring a state-law wrongful discharge claim in state court because the case presented a minor dispute: "[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law."¹²

D. Arbitration of Retaliatory Discharge Claims.

With respect to "whistleblower" claims of the type at issue in this case, Congress has passed legislation confirming its intent that these claims be resolved solely by RLA arbitrators. The Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 431 *et seq.*, provides that a railroad may not "discharge or in any manner discriminate against" an employee who has filed a complaint or instituted a proceeding related to the enforcement of the federal railroad safety laws (or who has or is about to testify in such a proceeding). 45 U.S.C. § 441(a). The statute further provides: "*Any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title [i.e., the RLA grievance arbitration process].*" *Id.* § 441(c) (emphasis added). The legislative history confirms that this language was intended to foreclose remedies other than RLA arbitration.¹³ The NRAB and

¹² The sweep of the *Andrews* decision is evident from the dissent of Justice Douglas, who recognized (and criticized) the majority holding that "Congress has vested the Board with jurisdiction to entertain nonreinstatement grievances such as Andrews' complaint." *Id.* at 331-32 (Douglas, J., dissenting).

¹³ See H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8 (1980), reprinted in 1980 U.S.C.C.A.N. 3830, 3832 ("The protections provided . . . would be enforced solely through the existing grievance procedures provided for in Section 3 of the Railway Labor Act,

other RLA adjustment boards have handled many claims alleging precisely the sort of retaliatory discharge claims advanced in this case.¹⁴

The FRSA did not *add* to the scope of the disputes subject to the RLA's mandatory processes. Rather, the legislative history of the FRSA confirms that Congress believed that retaliatory discharge claims were already included in the mandatory RLA arbitration framework as it existed prior to enactment of the FRSA. The House Committee Report stated that

"rail employees already receive similar protection, along with backpay, through the grievance procedure. *The Committee does not intend to alter the existing protection, but rather to put the prohibition of discrimination into statutory form.*" H.R. Rep. No. 1025, 96th Cong., 2d Sess. 16 (1980), reprinted in 1980 U.S.C.C.A.N. 3830, 3840 (emphasis added).

including the Adjustment Board, its divisions, and the 'Public Law Boards'); *id.* at 3841 ("The Committee intends this to be the exclusive means for enforcing this section.").

¹⁴ Public Law Board No. 3399, Award No. 4 (Mar. 11, 1985), at 6 (upholding grievance because suspension from service was "transparently retaliatory"); NRAB First Division Award No. 24059 (Feb. 6, 1991), at 1-2 (addressing claim that employee was discharged in retaliation for "comment and complaint of violations of safe operating procedures"); NRAB Second Division Award No. 12148 (Sept. 25, 1991), at 2 (addressing grievance that railroad had discharged employee in retaliation "for his having spoken to reporters on matters of public safety and concern" following dismissal of retaliatory discharge state-law tort suit); see also NRAB Third Division Award No. 27505 (Sept. 22, 1988) (addressing claim that employee "was constructively discharged when he was unwilling to perform allegedly felonious acts"); Public Law Board No. 4269, Award No. 300 (Sept. 25, 1990), at 1, 6 (addressing claim of harassment in retaliation "for reporting unsafe conditions and practices"); NRAB Third Division Award No. 28725 (Mar. 28, 1991), at 1, 9-10 (addressing grievance that employees had been subjected to discipline and harassment in retaliation for testimony to Federal Railroad Administration concerning safety matters); NRAB Third Division Award No. 23151 (Jan. 30, 1981), at 1, 6-7 (addressing grievance that employee had been dismissed in retaliation for "disloyalty" to the railroad).

Senator Cannon summarized the Senate Committee's views:

"The Senate committee recognizes that under current law rail employees . . . can seek similar protection through normal grievance procedures established under section 3 of the Railway Labor Act. This subsection is intended to codify the protection granted pursuant to those procedures by the law boards and panels. It is important to note in this regard that any grievance under this section is subject to the procedures set forth in section 3 of the Railway Labor Act." 126 Cong. Rec. S13337 (daily ed. Sept. 24, 1980) (statement of Sen. Cannon).

In short, Congress recognized that "whistleblower" claims were squarely within the ambit of mandatory RLA arbitration before passage of the FRSA.¹⁵ This acknowledgment is especially significant because it demonstrates that "whistleblower" claims in the airline industry, which is not subject to the FRSA, also fall within the scope of mandatory RLA arbitration.

As the Fourth Circuit has held, Congress's express provision of an exclusive arbitral remedy for these types of retaliatory discharge and discipline claims leaves no room for state-law tort suits based thereon. *Rayner v. Smirl*, 873 F.2d 60, 64-66 (4th Cir.), cert. denied, 493 U.S. 876 (1989). The Fourth Circuit's decision exhibits sensitivity to the concerns of expertise and uniform resolution that led Congress to refer minor disputes to arbitration in the first instance:

"[A] claim of wrongful discharge for 'whistleblowing' is inextricably tied to the question of precisely what

¹⁵ Congress's understanding was clearly correct; thus, long before the FRSA was passed the Fifth Circuit had held that employees claiming that the carrier had failed to accord them safe working conditions must "submit their grievances in that regard to the National Railway Adjustment Board for adjustment," even if the collective agreement was silent on the matter. *Missouri-K.-T. R.R. v. Brotherhood of R.R. Trainmen*, 342 F.2d 298, 300 (5th Cir. 1965).

. . . safety practices he was blowing the whistle on. To the extent that the justifiable nature of the whistleblowing enters the calculus in wrongful discharge actions, . . . safety laws might be subject to an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity . . . sought to avoid." *Rayner*, 873 F.2d at 66.

Applying that logic to this case would require reversal of the Hawaii Supreme Court's decision.

II. THE HAWAII SUPREME COURT'S PREEMPTION RULE LACKS FOUNDATION EITHER IN THE RLA OR THIS COURT'S PRECEDENTS AND WOULD CONTRAVENE THE RLA'S POLICIES.

A. The Hawaii Supreme Court Misread *Conrail*.

The Hawaii Supreme Court fully understood that "[m]andatory arbitration is the exclusive remedy for claims arising from minor disputes." Pet. App. 12a. For the Hawaii Supreme Court, the crucial question was "whether Norris' claims may be deemed 'minor,' thereby preempting his state tort action and requiring him to submit to mandatory arbitration pursuant to the RLA." *Id.* The Court concluded that respondent's retaliatory discharge claim is not a minor dispute, and thus not preempted by the RLA, because it "is not dependent on an interpretation of [the collective bargaining agreement]." Pet. App. 14a, 20a. The sole support for that holding was the Hawaii Supreme Court's reading of this Court's decision in *Conrail* as holding that "'minor' disputes, to which § 153 First (i) applies, are those that 'may be conclusively resolved by interpreting the existing [collective bargaining] agreement.'" Pet. App. 14a (quoting *Conrail*, 491 U.S. at 305).¹⁶

The Hawaii Supreme Court correctly quoted, but plainly misunderstood, this Court's holding in *Conrail*.

¹⁶ The Hawaii Supreme Court conceded that the statutory term "grievances" could be read to sweep more broadly, but concluded that this Court had "clearly determined otherwise in" *Conrail*. Pet. App. 14a.

That case was not concerned with RLA preemption of state law. Rather, the Court's purpose in *Conrail* was to "articulate[] an explicit standard for differentiating between major and minor disputes," 491 U.S. at 302, a distinction that is important because the RLA provides for entirely different procedures depending on whether a dispute is major or minor. See p. 6, *supra*. The problem faced by the Court in *Conrail* was that often a carrier would introduce a practice claiming a contractual right to take that action; conversely, the union would assert that the carrier was in fact unilaterally changing an existing agreement, thereby creating a major dispute. See 491 U.S. at 302. Writing for the majority in *Conrail*, Justice Blackmun resolved that internal RLA issue as follows:

"Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." 491 U.S. at 307 (emphasis added).

Therefore, the above-quoted language relied upon by the Hawaii Supreme Court appeared in the context of addressing the RLA's internal major/minor dispute distinction where a carrier claims contractual justification. Rather than touching at all on the RLA's reach with respect to other bodies of law, that language simply buttressed this Court's subsidiary conclusion that "the formal demarcation between major and minor disputes does not turn on a case-by-case determination of the importance of the issue presented or the likelihood that it would prompt the exercise of economic self-help." 491 U.S. at 305. Thus, the Court went on to assert that "the line drawn in *Burley* [between major and minor disputes] looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action," and thus that "[t]he distinguishing feature of *such a case* is

that the dispute may be conclusively resolved by interpreting the existing agreement." *Id.* (emphasis added).¹⁷

Although *Conrail* focused on the RLA's internal major/minor distinction where a party relies on the contract, that case was far from silent with respect to the general scope of the RLA's mandatory arbitration provisions. The portions of Justice Blackmun's opinion relating to that issue demonstrate the Court's intention to *preserve* rather than restrict Congress's broad statutory coverage of disputes "growing out of grievances" as well as those involving "interpretation or application of collective bargaining agreements." In particular, *Conrail* expressly recognized and quoted *Burley*'s long-standing explanation that RLA minor disputes include an "omitted case" "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement." 491 U.S. 303 (quoting *Burley*, 325 U.S. at 723).¹⁸

There is further indication in *Conrail* that this Court did not intend to cut back on the scope of the RLA's

¹⁷ A test for distinguishing between major and minor disputes is not useful to determine whether an individual grievance is a minor dispute. As noted above, minor disputes are subject to arbitration, while major disputes involve a lengthy process of collective bargaining and mediation between the union and the carrier. Because major disputes are essentially collective in nature and call for collective resolution, individual grievances of the type at issue here are not susceptible of characterization as major disputes. Because the grievance here was clearly not "major," there was no point in applying the *Conrail* test for distinguishing between "major" and "minor" disputes in this case.

¹⁸ In *Daniels v. Burlington N. R.R.*, 916 F.2d 568, 572 (9th Cir. 1990), *vacated upon settlement*, 962 F.2d 960 (9th Cir. 1992), the Ninth Circuit quoted this language in *Conrail* to *reject* an argument that an employment dispute was "not a 'grievance' under the RLA" because it did not "involve or arise out of the application or interpretation of a collective bargaining agreement." See also *Verdon v. Consolidated Rail Corp.*, 828 F. Supp. 1129, 1136 (S.D.N.Y. 1993) (quoting *Conrail* and finding employee's claim was a minor dispute because it was "'founded upon' . . . an 'incident of the employment relation'").

coverage. Immediately following the language upon which the Hawaii Supreme Court relied, this Court suggested that a reader "See Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568, 576 (1937)." 491 U.S. at 305. Dean Garrison made clear in that article that "[q]uestions of discipline or refusal to promote (constituting 'grievances') are reviewable by the Board" 46 Yale L.J. at 586. Thus, at an early point following the creation of the NRAB in 1934 he considered discipline (and promotion cases) as those that may give rise to the jurisdiction of the NRAB under the category of "grievances," rather than under the category arising out of the interpretation or application of agreements.¹⁹ As we have shown above, the legislative history of the RLA is in square accord with this reading of *Conrail*. See pp. 9-12, *supra*.²⁰

¹⁹ See also First Annual Report of the National Mediation Board 40 (1935) (Adjustment Board had adjudicated 15 cases of "complaints of improper discipline").

²⁰ We note that even if the *Conrail* language relied upon by the Hawaii Supreme Court were applicable in the preemption context, the dispute in this case would still qualify for preemption because it is one that "may be conclusively resolved by interpreting the existing agreement." 491 U.S. at 305 (emphasis added). That is so, among other reasons, because Article XVII of the agreement in this case prohibits disciplinary action for "refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law." Pet. App. 60a-61a. An RLA arbitrator's interpretation of that provision "may . . . conclusively resolve" the dispute in this case because it could result in a finding that Norris was or was not disciplined in retaliation for reporting a safety violation. The Hawaii Supreme Court's conclusion that Article XVII did not apply to Norris' dispute, on the ground that the provision related to the safety of the workplace rather than the safety of the public, Pet. App. 20a, was itself an impermissible judicial interpretation of the collective agreement.

B. The Hawaii Supreme Court's Misreading of *Conrail* Undermines its Analogy to *Lingle*.

As we have just shown, the Hawaii Supreme Court misread *Conrail* as restricting the category of minor disputes—and thus the coverage of the RLA mandatory arbitration provisions—to disputes which can be "conclusively resolved by interpreting the existing [collective bargaining] agreement." Pet. App. 14a. Based on this misreading of *Conrail*, the Hawaii Supreme Court thought that the scope of the definition of a minor dispute—and thus of mandatory and exclusive RLA arbitration—was "virtually indistinguishable" from the rule set forth in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). *Lingle* held that state law tort claims are not preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-188, unless an element of the claim "requires a court to interpret [a] term of a collective-bargaining agreement." Pet. App. 16a (quoting *Lingle*, 486 U.S. at 407). Thus, while acknowledging that "all parallels between the RLA and the LMRA must be drawn 'with utmost care,'" Pet. App. 14a (quoting *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971)), the Hawaii Supreme Court held that "Congress intended the mandatory arbitration provision of the RLA be confined to the same limits the Supreme Court applied to the LMRA in *Lingle*." Pet. App. 17a.

As we have shown above, however, the rule under the RLA is that the category of minor disputes subject to mandatory arbitration includes disputes "growing out of grievances" about the employment relationship in addition to disputes about interpretation of collective bargaining agreements. This rule is *not* "virtually indistinguishable" from the rule in *Lingle*, as the Hawaii Supreme Court held; on the contrary, it differs from the rule in § 301 arbitration cases with respect to precisely those limits on the scope of § 301 arbitration on which *Lingle* was predicated. Thus there is no sound basis for

the Hawaii Supreme Court's logic that *Lingle* applies because *Conrail* calls for essentially the same rule.²¹

In fact, there are major differences between the RLA and the LMRA that mandate broader preemption under the RLA than the *Lingle* rule provides under the LMRA. The National Labor Relations Act, as amended and supplemented by the LMRA, does not provide for or require arbitration of any disputes. It does state that "[f]inal adjustment by a method agreed upon by the parties is declared to be the *desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.*" 29 U.S.C. § 173(d) (emphasis added). Also, section 301 gives district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization," 29 U.S.C. § 185(a) (emphasis added), and thus to enforce agreements to arbitrate such disputes.²² That mere endorsement or encouragement of arbitration was held in *Lingle* to be sufficient to preempt state tort law that intrudes upon its scope as so restricted. 486 U.S. at 411.

In contrast with the LMRA, arbitration is not merely a "desirable method" for resolving disputes under the RLA; instead, it is *mandated* by Congress. Accordingly, this Court has recognized that "the case for insisting on resort to [RLA arbitration] remedies is if anything stronger in cases arising under the [RLA] than it is in cases arising under § 301 of the LMRA." *Andrews*, 406 U.S. at 323. Moreover, unlike the LMRA, the RLA's mandatory arbi-

²¹ Even if the Hawaii Supreme Court's interpretation of *Conrail* were to apply in the preemption context, that standard is not "virtually indistinguishable" from *Lingle*. We have shown that the dispute in this case "may be conclusively resolved by interpretation of the existing agreement," see note 20, *supra*, even if a similar dispute in *Lingle* was held not to have "require[d] a court to interpret [a] term of a collective-bargaining agreement."

²² See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960).

tration extends to disputes "growing out of grievances" in addition to disputes over interpretation or application of agreements. See pp. 6-8, *supra*.²³

In light of these differences in the statutory language and purposes, the Fourth, Sixth, Seventh, and Ninth Circuits have refused to import the rule in *Lingle* into the RLA context. *Underwood v. Venango River Corp.*, 995 F.2d 677, 682 (7th Cir. 1993) (holding that "[t]he Supreme Court's decisions in *Lingle* and *Andrews* support the position that preemption under the RLA is broader than preemption under the LMRA"); *Lorenz v. CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (contrasting scope of disputes subject to arbitration under RLA and NLRA); *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1309 (9th Cir. 1990) ("The preemption created under the RLA and that arising under § 301 of the LMRA are not analogous."); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334-35 n.4 (6th Cir.) (citing with approval a pre-*Lingle* RLA preemption case applying different standard), *cert. denied*, 493 U.S. 992 (1989); see *Calvert v. Trans World Airlines, Inc.*, 959 F.2d 698, 700 (8th Cir. 1992) (refusing to analogize from "outrageous conduct" exception to LMRA preemption).²⁴ In

²³ The Solicitor General's *amicus* brief in support of certiorari recognizes (at 15) that *Lingle* does not apply under the RLA, but deems the *Lingle* analysis "instructive" on the question of how to "accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interest of the States in adopting standards of conduct for employers subject to their police power." However, the "accommodation" reached in *Lingle*, i.e., that disputes are preempted when they require interpretation of agreements, is inconsistent with the language and policies of the RLA, where Congress mandated arbitration for a wider variety of disputes than those for which it suggested arbitration under the LMRA—only those involving contract interpretation.

²⁴ The Second and Third Circuits have suggested that RLA preemption might be broader but have not had occasion to decide whether it must be so in this particular context. *Pennsylvania Fed'n of Bhd. of Maintenance of Way Employees v. Amtrak*, 989 F.2d 112, 115 n.7 (3d Cir.) (applying *Lingle* to find preemption

other cases as well, the appellate courts have referred to differences in the purposes of the statutes to find the RLA's scope broader.²⁵

but observing RLA may be broader), *cert. denied*, 114 S. Ct. 85 (1993); *Baylis v. Marriott Corp.*, 906 F.2d 874, 878 (2d Cir. 1990), *citing with approval* *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102, 106 (2d Cir. 1987) ("RLA likely has greater preemptive reach than LMRA"), *cert. denied*, 486 U.S. 1054 (1988). The First Circuit has found preemption using an analysis similar to *Lingle*, but added that "to allow state law claims arising out of the employment relation" to be brought in court would "undermine the scheme for labor dispute resolution" and the "purposes behind the RLA." *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 4 (1st Cir. 1992) (emphasis added), *cert. denied*, 113 S. Ct. 980 (1993). The two federal circuits that have rejected RLA preemption using the *Lingle* analysis did so based on the narrow reading of *Conrail* discussed above, from which they concluded, like the Hawaii Supreme Court, that the RLA's coverage is no different from the coverage of the LMRA and the preemption analysis is therefore the same. *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 595-96 (5th Cir. 1993); *Davies v. American Airlines, Inc.*, 971 F.2d 463, 468 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993); see also *Maher v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750 (N.J. 1991); *IAM v. Allegis Corp.*, 545 N.Y.S.2d 638 (N.Y. Sup. Ct. 1989) (applying *Lingle* to RLA).

²⁵ See, e.g., *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1052 (7th Cir. 1983) ("It follows . . . that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA."), *cert. denied*, 465 U.S. 1007 (1984); *Hubbard v. United Air Lines*, 927 F.2d 1094 (9th Cir. 1991) (preemption broader under RLA); *Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1169 (4th Cir.) ("Unlike preemption under the NLRA, the preemption of state law claims under the RLA has been more complete."), *cert. denied*, 479 U.S. 946 (1985); *Gonzalez v. Prestress Eng'g Corp.*, 503 N.E.2d 308, 313 (Ill. 1986) (case denying preemption under RLA was "clearly inapposite" to section 301 analysis), *cert. denied*, 483 U.S. 1032 (1987); *Brown v. Missouri Pac. R.R.*, 720 S.W.2d 357, 359 n.5 (Mo. 1986) (en banc) (NLRA "is much less impacting than" RLA), *cert. denied*, 481 U.S. 1049 (1987). But see, e.g., *Sabich v. National R.R. Passenger Corp.*, 763 F. Supp. 989, 992-93 (N.D. Ill. 1991) (holding *Lingle* standard applied in RLA context); *Elliott v. Consolidated Rail Corp.*, 732 F. Supp. 954, 957 (N.D. Ind. 1990) (applying *Lingle*-type analysis in RLA context without addressing differences between RLA and LMRA).

C. The Additional Cases Cited by the Solicitor General Do Not Support Narrow Preemption Under *Conrail/Lingle*.

In his *amicus* brief supporting *certiorari* (at 12), the Solicitor General advances an argument not made in the Hawaii Supreme Court's opinion—that failure to limit the coverage of the RLA's mandatory arbitration provisions would result in "an unduly broad preemption of state tort law, in contravention of this Court's precedents." We observe, as an initial matter, that in the preemption inquiry "[t]he purpose of Congress is the ultimate touchstone," *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963), not what the impact of Congress's intended preemption will be. If Congress intended the coverage of the RLA's mandatory arbitration provisions to reach broadly (as shown above, pp. 6-17, *supra*), that intention is not altered by an Executive Branch value judgment that the resulting preemption of state law is "undue."

Indeed, the preemption of state law that would result from giving effect to Congress's intent to encompass disputes "growing out of grievances" within the RLA's mandatory processes would *not* be "undue." After all, *Lingle* and its progeny provide a strong rule of preemption of state-law tort claims involving interpretation of agreements, which is the limit of the LMRA's statutory reach. 486 U.S. at 411 (such claims are "firmly in the arbitral realm").²⁶ It should not be surprising that Con-

²⁶ Lower courts following *Lingle* have held any number of state tort claims preempted by the NLRA. See, e.g., *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 530 (10th Cir. 1992) (claims for intentional infliction, fraud, invasion of privacy, defamation, false imprisonment, and conversion arising out of discipline investigation preempted because "[a]n analysis of whether T.G. & Y. acted properly or not will inevitably require an analysis of what the CBA permitted"); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 537 (4th Cir. 1991) (claims for intentional infliction, conversion, and negligence preempted because "[m]anagement simply could not have acted negligently or wrongfully if it acted in a manner contemplated by the collective bargaining agreement"), *cert. denied*,

gress intended a broader scope of preemption in the railroad (and airline) industries, where a "lasting history of pervasive and uniquely-tailored congressional action indicates Congress's general intent that [they] should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 152 (6th Cir. 1993); see *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 687 (1982) (noting that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century").²⁷

The preemption of state law at issue here would not, as the Solicitor General says (at 12), "contraven[e] . . . this Court's precedents." The Solicitor General mainly relies on *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714, 724 (1963), in which this Court held that nothing in federal law, including the RLA, preempted enforcement of a state law forbidding discrimination in hiring. The Court did not discuss preemption by reason of arbitral jurisdiction over

112 S. Ct. 912 (1992); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 119 (1st Cir. 1988) (statutory invasion of privacy claims could "only be resolved by deciding whether the employer's conduct was 'reasonable' under the labor contract"), *cert. denied*, 490 U.S. 1107 (1989).

²⁷ The Solicitor General overstates the likely preemptive effect of including employment-related "grievances" within the RLA's scope, in addition to disputes over interpretation or application of collective agreements. Because collective labor agreements include implied agreements from past practices, as the Solicitor General acknowledges (at 12 n.9), most RLA minor disputes *do* involve "application or interpretation" of implied, if not express, agreement terms. See note 5, *supra*. Such disputes would be preempted even if the *Lingle* standard were applied in the RLA context. The chief effect of not applying the *Lingle* rule in the RLA context, thus, would be preemption of retaliatory discharge claims, which are "grievances" but were held in *Lingle* (at least under Illinois law) not to require interpretation of the collective agreement. 486 U.S. at 406-07. Based on Congress's clear intent to commit railroad and airline retaliatory discharge claims to RLA arbitration, see pp. 14-17, *supra*, preemption of these claims, at least, would not be "undue."

RLA grievances, and insofar as appears that was not an issue in the case.²⁸

In any event, there is certainly no need to decide in this case whether preemption of a state-law claim for retaliatory discharge, which Congress clearly intended to be encompassed within RLA mandatory arbitration, see pp. 14-17, *supra*, would also affect claims by employees for wrongful discharge by reason of racial or other discrimination prohibited by a state civil rights law. That issue is not presented here and involves considerations not present in this case. For example, Title VII of the Civil Rights Act of 1964 contains provisions for allocating enforcement functions between federal and state authorities where state or local laws address the "unlawful employment practice" at issue. 42 U.S.C. § 2000e-5(c) through (f). It may be that preemption of such a state discrimination statute involves issues similar to those raised by accommodation of the RLA with Title VII itself.²⁹

Finally, preemption of retaliatory discharge claims does not mean that arbitrators could (much less that they would) run roughshod over paramount public policies. An arbitration award is unenforceable by the courts if that "would violate 'some explicit public policy' that is 'well defined and dominant,' and is to be ascertained 'by

²⁸ This is understandable because that jurisdiction is limited to disputes between "an employee or group of employees and a carrier or carriers," 45 U.S.C. § 153 First (i), and thus does not apply to disputes growing out of applications for employment, such as the dispute in that case. See 45 U.S.C. §§ 151 Fifth, 181 (defining "employee" for purposes of the RLA).

²⁹ The Court addressed an analogous situation in *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987). There, the Court accommodated the seemingly conflicting provisions in two federal statutory schemes, *i.e.*, the RLA and the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, by holding that Congress, by enacting these statutes, intended that a railroad employee may bring suit for a personal injury cognizable under the FELA even though a grievance over the events at issue could also be pursued under the RLA. *Id.* at 564.

references to the laws and legal precedents" *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)). But, as the Court also held in *Misco*, such public policy review does not permit the courts to engage in factfinding as that is "the arbitrator's task." 484 U.S. at 44-45. Although *Misco* concerned arbitration under the NLRA, the lower courts have held "that arbitration awards under the [RLA] are subject to public policy review" with the same limits on such review (which include "observing the Railway Labor Act's proscription against judicial factfinding"). *Union Pac. R.R. v. United Transp. Union*, 3 F.3d 255, 260-61, 264 (8th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3471 (1994).³⁰ In allowing Norris to short circuit the grievance procedure, the Hawaii Supreme Court has circumvented these limitations on public policy review of arbitration awards, including the factfinding function of the arbitrator.³¹

³⁰ Accord, *Delta Air Lines v. Air Line Pilots Ass'n*, 861 F.2d 665, 669-71 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989); see *Northwest Air Lines v. Air Line Pilots Ass'n*, 808 F.2d 76, 83-84 (D.C. Cir. 1987) (pre-*Misco*).

³¹ The Solicitor General also expresses concern (at 13) that "arbitrators would be required to adjudicate issues of state tort law," citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) and *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991). The Solicitor General speculates (at 13 n.10) that *Alexander* would prohibit arbitrators from adjudicating such issues, and that this Court's forum-selection ruling in *Gilmer* (which held that a federal age discrimination claim had to be resolved by an arbitrator rather than a court, 111 S. Ct. at 1652) would not apply. Because this case involves preemption of state tort claims rather than the appropriate forum for resolving federal claims, there is no occasion here for this Court to consider the *Gilmer* forum-selection issue vis-a-vis the RLA's mandatory arbitration provisions. We are constrained to note, however, that should an appropriate case reach this Court, the Solicitor General's asserted ground for distinguishing *Gilmer* (at 13 n.10), i.e., that there is "tension between collective representation and individual statutory rights," does not apply in the RLA context, where employees are guaranteed

D. The Hawaii Supreme Court's Preemption Rule Would Contravene The Policies of the F.L.A.

The rule adopted by the Hawaii Supreme Court would do violence to fundamental RLA policies. First, such a rule jeopardizes the consistency and uniformity in railroad and airline labor relations that Congress sought to protect. E.g., *Pennsylvania R.R. v. Day*, 360 U.S. 548, 552-53 (1959). The railroad industry operates in 49 states and the airline industry operates in all 50 states, with most carriers operating in more than one state. Pinning preemption to the question of whether the elements of a particular claim require "interpretation" would hold Congress's policy of uniformity hostage to arcane distinctions in the substantive tort law of each state. For example, in *Beard v. Carrollton R.R.*, 893 F.2d 117 (6th Cir. 1989), the Sixth Circuit held that a claim for wrongful interference with contract under Kentucky law was preempted because Kentucky makes breach of contract an essential element of the claim, thereby requiring interpretation; the court observed, however, that under Ohio law, such a claim would not be preempted because Ohio law "is to the contrary." *Id.* at 122 & n.1. Even in the realm of retaliatory discharge, variations in state tort laws and the underlying fact patterns would result in confusion and inconsistent results. See *Magerer v. John Sexton & Co.*, 912 F.2d 525, 529 (1st Cir. 1990) (finding retaliatory discharge claims preempted under Massachusetts law but not the Illinois statute applied in *Lingle*); *Medrano v. Excel Corp.*, 985 F.2d 230, 233-34 (5th Cir.) (finding preemption because employee argued that collective agreement violated retaliatory discharge statute), *cert. denied*, 114 S. Ct. 79 (1993). Adding to these complications would be potential choice-of-law issues that could arise because employees in the airline and railroad industries often spend their working time in more than one state.

the right to file and pursue grievances through RLA arbitration without union involvement and with their own counsel. 45 U.S.C. § 153 First (j); see pp. 6-7, *supra*.

Thus, as the Fourth Circuit in *Rayner* warned, allowing state-law claims in such circumstances could result in "an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity . . . sought to avoid." *Rayner v. Smiri*, 873 F.2d 60, 66 (4th Cir. 1989).

In addition to jeopardizing consistency and uniformity, a narrow preemption rule could undermine the integrity of the RLA's mandatory grievance processes. Rail and airline employees have formulated a wide variety of creative tort theories in attempts to bring their claims before a jury.³² The rule adopted by the Hawaii Supreme Court would encourage such attempts by allowing artful pleading of claims that do not strictly depend on "interpretation" for their resolution. "[I]f the courts can be used as forums to resolve arbitrable disputes, employees can make an end run thereby avoiding the carefully crafted congressional procedures set forth in the RLA. These results cannot be squared with federal policy." *DeTomaso v. Pan Am. World Airways, Inc.*, 733 P.2d 614, 621 (Cal.), *cert. denied*, 484 U.S. 829 (1987).

CONCLUSION

For the reasons stated above, the judgment of the Hawaii Supreme Court should be reversed.

³² See, e.g., *Lorenz v. CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (defamation); *Calvert v. Trans World Airlines, Inc.*, 959 F.2d 698, 700 (8th Cir. 1992) (international infliction); *Rayner v. Smiri*, 873 F.2d 60 (4th Cir. 1989) (retaliatory discharge); *Morales v. Southern Pac. Transp. Co.*, 894 F.2d 743, 745-46 (5th Cir. 1990) (fraud); *Beard v. Carrollton R.R.*, 893 F.2d 117, 121-22 (6th Cir. 1989) (intentional infliction and interference with contractual rights); *Leu v. Norfolk & W. Ry.*, 820 F.2d 825, 829-30 (7th Cir. 1987) (fraud and conversion); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 192 (9th Cir. 1983) (wrongful demotion); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.) (intentional infliction), *cert. denied*, 439 U.S. 930 (1978); *Campbell v. Pan Am. World Airways, Inc.*, 668 F. Supp. 139, 145-46 (E.D.N.Y. 1987) (defamation and false imprisonment); *Carson v. Southern Ry.*, 494 F. Supp. 1104 (D.S.C. 1979) (slander).

Respectfully submitted,

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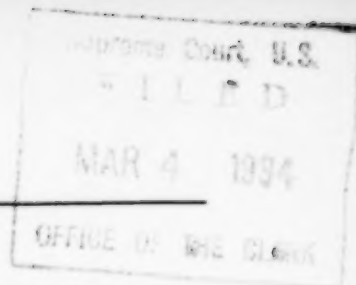
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Dated: March 4, 1994

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No. 92-2058



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

Hawaiian Airlines, Inc., et al.,

Petitioners,

v.

Grant T. Norris,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

BRIEF OF AIR TRANSPORT ASSOCIATION OF
AMERICA AS AMICUS CURIAE IN SUPPORT OF
PETITIONERS

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In The
Supreme Court of the United States
October Term, 1993

No. 92-2058

Hawaiian Airlines, Inc., et al., *Petitioners*,

v.

Grant T. Norris, *Respondent*.

On Writ of Certiorari to the
Supreme Court of Hawaii

Brief of
Air Transport Association of America As
Amicus Curiae In Support of Petitioners

INTEREST OF THE AMICUS CURIAE

The Air Transport Association of America ("ATA"), is a non-profit unincorporated trade association of United States federally certificated air carriers. ATA was founded in 1936 to facilitate the exchange of ideas and information concerning matters that affect the airline industry, and to represent the member carriers in legislative, judicial and administrative matters.¹ ATA has filed numerous *amicus*

¹ The operator members include Alaska Airlines, Aloha Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express Corp.,
(continued...)

briefs in federal and state court proceedings concerning a broad variety of issues of concern to its members. ATA also works closely with the various Federal agencies that regulate the airline industry, such as the Federal Aviation Administration and the U.S. Department of Transportation. ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by U.S. air carriers, transporting 475 million passengers over 485 billion miles in 1993. ATA's members employ over 535,000 people, the majority of whom are subject to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*

Congress recognized the important role of air carriers in interstate commerce when it enacted the Federal Aviation Act and when, in 1936, it added air carriers to the coverage of the RLA. Congress recently reemphasized the economic importance of the airline industry to interstate commerce when it enacted legislation creating the National Commission to Ensure a Strong Competitive Airline Industry. Pub. L. No. 103-13, 107 Stat. 43 (1990).

All air carrier members of ATA are subject to the RLA and are significantly affected by state and federal court decisions, such as the one below, that undermine the RLA's comprehensive procedures for resolution of employment disputes. These RLA procedures are designed to facilitate the peaceful and expeditious resolution of such disputes and to avoid interruptions to vital interstate commerce. These procedures will be eroded if state and federal courts, like the Hawaii Supreme Court in this case, allow state law causes of action that overlap RLA grievances to escape preemption by the RLA. Moreover, in the 1990's, when airline losses have

1(...continued)

Hawaiian Airlines, Northwest Airlines, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Air Lines, UPS Corp. and USAir. Associate members are Air Canada and Canadian Airlines International.

exceeded \$11 billion, airlines are especially concerned with effective management of operations which cross many state lines. These operations cannot be administered efficiently when varied local laws and remedies affecting employment relationships are held to be permitted, rather than preempted by the RLA. Accordingly, the ATA files this brief as *amicus curiae* in support of the petitioners.²

STATEMENT OF THE CASE

The ATA adopts the Statement of the Case set forth by Petitioners. Briefly, Respondent Grant T. Norris, a mechanic employed by Petitioner Hawaiian Airlines, Inc., performed work on a tire assembly that he believed to be unsafe. His supervisor asked him to sign off on the work under the terms of the collective bargaining agreement that stated: "An airline mechanic may be required to sign work records in connection with the work he performs." Norris refused, and was suspended pending an investigation of the question whether Hawaiian Airlines had just cause to terminate him. The mechanics' collective bargaining agreement, Article XVII ¶ F, provided that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action." The agreement also provided a multi-level grievance and arbitration procedure culminating with a decision by a System Board of Adjustment, as required by the Railway Labor Act, 45 U.S.C. § 184.

After the grievance procedure was initiated, Norris reported to the Federal Aviation Administration ("FAA") that the tire assembly was unsafe, and the FAA inspected the tire assembly and had it removed from the aircraft. Norris proceeded through the first stage of the grievance process,

2 This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 37.3.

where his discipline was reduced to a six-week suspension. Norris then abandoned the grievance and arbitration procedure, and filed suit in state court against Hawaiian Airlines and a number of supervisors alleging, *inter alia*, that his discharge violated the public policies reflected in the Federal Aviation Act and the Hawaii Whistleblower's Protection Act. Norris' claims are common law claims; his Complaint is not premised upon any alleged statutory violation.

The First Circuit Court of Hawaii held that the claims were preempted by the Railway Labor Act. The Hawaii Supreme Court reversed, based on the preemption test set forth in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (hereinafter "*Lingle*"), a case interpreting section 301 of the Labor Management Relations Act ("LMRA") rather than the Railway Labor Act.

SUMMARY OF ARGUMENT

This case presents the question whether the Railway Labor Act preempts respondent's state law wrongful discharge claims. The Hawaiian Supreme Court below found no RLA preemption, expressly relying upon this Court's decision in *Lingle*, a case which arose under the very different statutory scheme of the LMRA. In resolving this issue, the Court will decide whether to follow or limit its decision in *Andrews v. Louisville & N. Ry. Co.*, 406 U.S. 320 (1972) (hereinafter "*Andrews*"), which held that a wrongful discharge claim premised on violation of contract terms was preempted by the RLA's mandatory and exclusive Adjustment Board processes.

Andrews should be followed in this case, for -- unlike the LMRA, where arbitration is voluntary -- the language, legislative history, and policy of the RLA all indicate a clear Congressional intent that discipline and discharge claims by employees of RLA carriers must be presented to Adjustment Boards, not to state courts, whether

or not these claims are presented as or are intertwined with contract interpretation issues.

The RLA repeatedly and explicitly commands that discipline and discharge grievances go to Adjustment Boards, whether or not the dispute is contract-based. For example, RLA Section 2 calls for "prompt and orderly settlement of *all disputes* growing out of *grievances* or out of the interpretation or application of agreements . . ." 45 U.S.C. § 151a (emphasis added). This plain legislative command concerning the mandatory and exclusive Adjustment Board dispute resolution processes is reinforced by the legislative history, which demonstrates that the language was intentionally chosen by Congress to include disciplinary matters and that Congress rejected efforts to add less preemptive provisions to the statute.

Broad preemption of state wrongful discharge claims by the RLA's Adjustment Board processes is fully supported by this Court's prior constructions of the RLA, and by the structure and purposes of the statute. The Court has long held that these processes encompass not only contract disputes, but "all other incidents of that [employer-employee] relation," *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 733-34 (1945), and it has repeatedly rejected efforts by carriers, unions, and employees alike to circumvent Adjustment Boards in favor of judicial forums. This Court has recognized in its decisions several critical aspects of the RLA statutory scheme Congress created that compel a preemptive effect over state wrongful discharge claims: nationwide uniformity in dispute resolution processes involving interstate carriers; substantial benefits to carriers, unions, and employees of Adjustment Board processes; and Adjustment Board expertise concerning industry-specific issues, including reconciliation of safety and work performance concerns.

In light of this plain statutory language and clear evidence of Congressional purpose, the Court should reject

the flawed analytical framework for resolving this case used by the Supreme Court of Hawaii and supported by the Solicitor General. It is spurious, and destructive of the RLA's dispute-resolution processes, to suggest that the Court's decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989) (hereinafter "*Conrail*"), supports a different result. The Court should not be misled into applying authority dealing with *which* of two RLA dispute resolution processes are appropriate (those for "major" versus "minor" disputes) to create a third type of employer-employee dispute addressed by *neither* of these processes. Discipline and discharge cases clearly give rise to minor disputes reserved for mandatory arbitration under the RLA.

ARGUMENT

I. THE RAILWAY LABOR ACT'S MANDATORY ADJUSTMENT BOARD PROCESSES PREEMPT RESPONDENT'S STATE WRONGFUL DISCHARGE CLAIM.

The extent to which a federal statute preempts state law is determined by the extent to which Congress chose to exercise its authority to cause such preemption; such preemption is purely a matter of statutory construction. *Gade v. National Solid Wastes Management Association*, 112 S.Ct. 2374, 2383 (1992) ("nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act"). Thus, this Court has held that some federal labor laws broadly preempt state laws beneficial to employees, but that other federal labor laws do not preempt state provisions protecting employees. Compare *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (ERISA broadly preempts state workers' compensation law) with *California Federal Savings & Loan*

Assn. v. Guerra, 479 U.S. 272 (1987) (Title VII does not preempt state protection of pregnant women).

As this Court has repeatedly observed, the RLA was intended by Congress to displace much state law that might otherwise apply to employees in the railroad and airline industries.³ Indeed, in *Andrews*, this Court held an employee's wrongful discharge claim premised on violation of contract terms was preempted by the RLA because the employee's exclusive remedy was before the RLA Adjustment Board. The *Andrews* Court noted that "the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." 406 U.S. at 322.

Respondent's position would require that this Court restrict *Andrews* to its facts. As will be seen below, such a restriction would be untenable, for the RLA's language, legislative history, and policy require preemption of all state wrongful discharge actions. Arbitration before an Adjustment

³ See, e.g., *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 (1969), *reh'g denied*, 394 U.S. 1024 (1969) (state law restricting self help is preempted: "interference would be compounded if the disputants were--as they frequently would be--subjected to various and divergent state laws."); *Union Pacific R.R. v. Price*, 360 U.S. 601, 617 (1959) ("To say that the discharged employee may litigate the validity of his discharge in a common-law action for damages after failing to sustain his grievance before the Board is to say that Congress planned that the Board should function only to render advisory opinions, . . . 'with the consequence that the parties are entirely free to accept or ignore the Board's decision . . . [a contention] inconsistent with the Act's terms, purposes and legislative history.'"); *California v. Taylor*, 353 U.S. 553, 559, 566 (1957) (RLA's "policy of protecting collective bargaining comes into conflict with the rule of California law that state employees have no right to bargain collectively * * * [T]he Railway Labor Act is 'all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.'")

Board provides the sole forum in which a covered employee may challenge a discharge, regardless of whether the dispute involves contract interpretation issues. To be sure, both the arbitration forum and the "just cause" standard generally applicable to Adjustment Board determinations will be more or less desirable to a covered employee depending on the state law that might otherwise apply absent RLA processes. However, dilution or abandonment of the RLA Adjustment Board process for resolving such employee disputes is for Congress, not this Court, to address.

A. Preemption Is Mandated By The Plain Language Of The RLA.

The RLA contains uniquely broad language addressing settlement of employment disputes. No fewer than six times, Congress explicitly has decreed that RLA dispute resolution processes not be limited to contract interpretation issues, but encompass all employee disputes with RLA-covered employers. The RLA general purpose clause, Section 2, states that the statute is "to provide for the prompt and orderly settlement of *all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.*" 45 U.S.C. § 151a (emphasis added). Section 2, First requires carriers and their employees to "settle *all disputes, whether arising out of the application of such [collective bargaining] agreements or otherwise.*" 45 U.S.C. § 152, First (emphasis added). Section 3, First (i) establishes Adjustment Boards for "[t]he disputes between an employee or group of employees and a carrier or carriers growing *out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions*" 45 U.S.C. § 153,

First (i) (emphasis added).⁴ Congress' use in these statutory phrases of the disjunctive "or" (along with its repetition of the words "out of" in 45 U.S.C. § 151a and 153, and use of the word "otherwise" in 45 U.S.C. § 152, First) combined with its repeated reference to "all disputes," makes this broad legislative intent clear. *Accord* 45 U.S.C. § 152, Sixth ("dispute . . . arising *out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . .*").

Two equally broad provisions were added in 1936, when the RLA was amended to establish Adjustment Boards for the airline industry.⁵ Rather than narrow Adjustment Board authority over employee disputes in the airline industry, Congress used language identical to that adopted in 1926 to ensure that all employee disputes, not merely contract disputes, would be handled by Adjustment Boards. 45 U.S.C. § 184 ("disputes . . . growing *out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . .* may be referred . . . to an appropriate adjustment board . . ."); 45 U.S.C. § 185 (NMB may create National Air Transport Adjustment Board "in order to provide for the prompt and orderly settlement of disputes between said

4 The error of the Hawaii Supreme Court is nowhere more striking than in its conclusion that "the *plain language* of § 153 First(i) does not support preemption of disputes independent of a labor agreement." *Norris v. Hawaiian Airlines*, 842 P.2d 634, 642 (Haw. 1992) (emphasis added).

5 Conversely, Congress has since 1926 passed and amended numerous statutes regulating labor relations in both the private and public sectors, *none* of which contains such a broad mandate for dispute resolution as the Adjustment Board system established by the RLA. For example, the Labor Management Relations Act creates no mandatory arbitration processes but rather establishes federal court jurisdiction in §301 over "suits for *violation of contracts* between an employer and a labor organization." 29 U.S.C. § 185(a)(emphasis added).

carriers by air . . . and . . . employees, growing out of grievances, or out of the interpretation or application of agreements . . . covering rates of pay, rules, or working conditions . . .").⁶

The plain language of the RLA thus demonstrates that exclusive Adjustment Board authority to resolve disputes explicitly extends beyond contract application disputes. Congress, by using the phrases "*all disputes, growing out of grievances or out of the interpretation or application of [collective bargaining] agreements*" and "*all disputes, whether arising out of . . . agreements or otherwise,*" cannot be deemed to have sent only contract interpretation matters to the Adjustment Boards. RLA Adjustment Boards were to resolve *all* employee disputes, not merely contract disputes.

B. Preemption Is Supported By The Legislative History Of These Provisions Of The RLA.

Since the respondent's "wrongful discharge" claim is precisely the sort of dispute preempted by the language of

⁶ The 1936 amendments extending the RLA to air carriers included provisions for system Boards of Adjustment even though there were no collective bargaining agreements yet in existence, thus showing that Congress intended Adjustment Boards to resolve "individual disputes" other than those arising out of application of an agreement:

[T]here are no such [airline collective bargaining] contracts in operation now. . . .

Section 3 of the original act permits the formation of regional boards to handle local disputes and the same option obtains as to air transportation. Thus by affording a permissive delay in the formation of the permanent board it was thought that temporary boards might be created under this power to *settle individual disputes* pending the time when the volume of disputes warranted the creation of a full-time board.

H.R. Rep. No. 2243, 74th Cong., 2d Sess., 1 (1936) (emphasis added).

the RLA, it is not essential to examine the RLA's legislative history. Nevertheless, that history reinforces that Congress intended to give Adjustment Boards exclusive authority over all employee disputes with their employers, whether or not such disputes arise out of interpretation of collective bargaining agreements. This history also demonstrates that wrongful discharge and discipline issues, in particular, were included among these preempted disputes.

In the 1926 debates concerning the RLA, Senator Watson, a proponent of the proposed legislation, clearly viewed grievances "of a personal nature," as well as disputes involving contract interpretation issues, to be within the purview of Adjustment Boards:

[T]here are two classes of disputes that arise in connection with the operation of railroads. One class is what are ordinarily called grievances. They may be of a personal nature; they may involve a great many employees; they may involve a few employees; they may involve but one employee. Of this class, *also*, are disputes rising out of the interpretation and application of existing agreements as to wages, hours of labor, or working conditions.

67 Cong. Rec. 8807 (1926) (statement of Sen. Watson) (emphasis added).

Similarly, Representative Barkley, the RLA's sponsor, explained that Adjustment Boards were meant to resolve grievance and discipline matters going beyond contract interpretation issues:

We provide that it shall be their duty to set up adjustment boards, not to consider questions of wages but disagreements over *grievances, interpretations, discipline, and other technicalities* that arise from time to time in the workshop and out on the tracks in the operation of the roads.

67 Cong. Rec. 4517 (1926) (statement of Rep. Barkley) (emphasis added).

Representative Crosser described the RLA dispute-resolution mechanisms in broad terms, unconstrained by the notion that an arbitrator's duties should be narrowly confined to interpreting collective bargaining agreement provisions, as follows:

These boards serve in a manner as courts to determine who is right and who is wrong, what is just and what is unjust, in disputes between railroads and their employees.

67 Cong. Rec. 4665 (1926) (statement of Rep. Crosser). See also 67 Cong. Rec. 4670 (1926) (statement of Rep. Arentz) ("Minor disputes involve discipline, grievances, and disputes over the application and meaning of an agreement.")

Congress' intent to preempt state law is also supported by the fact that, in the only two instances when Congress explicitly considered deferral to state employee-protective laws, it chose not to defer. An amendment proposed while the RLA of 1926 was under consideration by Congress would have permitted operation of state arbitration laws as an alternative to the arbitration procedures set forth in

the RLA. The proposed amendment was rejected.⁷ Later, in 1950, when Congress added dues checkoff and union security provisions to the RLA, it expressly declined to permit employees to "opt out" of compulsory union membership in deference to state right-to-work laws.⁸

Finally, Congress recognized that Adjustment Boards are the best forum for striking the proper balance between employee assertions of safety concerns and employer interests

7 67 Cong. Rec. 4699-4710 (1926). In the 1926 debate regarding the preemptive effect of RLA § 7, providing for voluntary arbitration of major disputes about contract formation, a Kansas statute that compelled arbitration was extensively discussed. Representative Tincher from Kansas argued "[t]here is no . . . good reason for putting a provision in this bill . . . to enunciate the principle of being willing to abrogate State laws, where they attempt to force arbitration . . ." *Id.* at 4706. Representative Newton responded, "when Congress writes a law for voluntary arbitration it ought to protect that legislation by proper safeguards from permitting a State even to attempt to . . . impose a legal obligation to submit to compulsory arbitration." *Id.* at 4706.

8 As the House Committee Report emphasized:

if . . . [union security] agreements are to be permitted in the railroad and airline industries it would be wholly impracticable and unworkable for the various States to regulate such agreements. Railroads and airlines are direct instrumentalities of interstate commerce; the Railway Labor Act requires collective bargaining on a system-wide basis; agreements are uniformly negotiated for an entire railroad system and regulate the rates of pay, rules of working conditions of employees in many States; the duties of many employees require the constant crossing of State lines; many seniority districts under labor agreements extend across State lines, and in the exercise of their seniority rights employees are frequently required to move from one State to another.

H.R. Rep. No. 2811, 81st Cong., 2d Sess., 5 (1950). The Senate rejected a proposed amendment offered by Senator Holland that would have prevented federal preemption of state right-to-work laws. 96 Cong. Rec. 16,376 (1950).

in production, including employer interests that alleged safety concerns not be improperly asserted to avoid performance of work duties.⁹ The lower courts have acknowledged RLA coverage of such workplace safety disputes, and have not hesitated in sending them to Adjustment Boards, even when the collective bargaining agreements contain no express provisions on this subject.¹⁰ Moreover, in adopting the 1980 Amendments to the Federal Railroad Safety Act, Congress explicitly recognized that Adjustment Boards are the proper

9 Refusal to perform work for spurious safety reasons can be a form of job action in the airline and railroad industries. For example, in the following cases, such "safety" protests were enjoined. *Long Island R.R. v. System Federation No. 156*, 368 F.2d 50, 52 (2d Cir. 1966) (union "'blue-flagged' the trains, not for safety reasons, but to coerce the Railroad into bypassing System Federation and negotiating with the Brotherhood alone as representative of the carmen."); *Missouri-Kansas-Texas R.R. v. Brotherhood of R. Trainmen*, 342 F.2d 298, 300 (5th Cir. 1965); *Texas International Airlines, Inc. v. Air Line Pilots Ass'n*, 518 F. Supp. 203, 207 (S.D. Tex. 1981) (pilots enjoined from delaying and disrupting operations via "report[ing] equipment outages or malfunctions"); *Long Island R.R. v. Brotherhood of Locomotive Engineers*, 290 F.Supp. 100 (E.D.N.Y. 1968) (union's rationale for refusing to perform trips in and out of Penn Station due to safety concerns is "spurious").

10 See *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F.2d 139 (2d Cir. 1986) (discipline of flight attendant who informed FAA that Pan Am violated flight and duty time rules presents a minor dispute for Adjustment Board); *Trainmen*, 342 F.2d at 300 (safety dispute is for Adjustment Board despite the silence of the labor contract as to any terms governing unsafe working conditions; "the common law duty . . . to use reasonable care in furnishing its employees with a safe place to work is clear. . . . If . . . plaintiff has failed to perform that duty its employees are required by the Railway Labor Act to submit their grievances in that regard to the NRAB . . ."); *Springfield Terminal v. United Transp. Union*, 675 F. Supp. 683 (D. Me. 1987); 767 F. Supp. 333, 340 (D. Me. 1991) (safety protest issues fall "precisely within the arbitration board's range of expertise," quoting *United Paperworkers v. Misco*, 484 U.S. 29, 45 n.11 (1987) ("The issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases."))

forum for such questions. In Section 10, 45 U.S.C. § 441, Congress adopted whistleblower protection for employees who reported safety concerns or who refused to work in unsafe conditions. Congress also wrote certain standards into the Act, however, to ensure that safety protests did not encroach upon the legitimate concern of management with running the business.¹¹ Congress recognized that it is the RLA Adjustment Boards that must resolve any differences in accommodating these interests.¹² Adjustment Boards are

11 The refusal to work is protected only if it "is made in good faith and no reasonable alternative to such refusal is available . . . the hazardous conditions is of such a nature that a reasonable person . . . would conclude that . . . the condition presents an imminent danger . . . there is insufficient time . . . to eliminate the danger through resort to regular statutory channels . . . [and] the employee . . . has notified his employer of . . . his intention not to perform further work . . ." 45 U.S.C. § 441(b).

12 "[U]nder current laws railroad employees . . . can seek similar protection through normal grievance procedures established under section 3 of the [RLA]. This subsection is intended to codify the protection granted . . . by the law boards and panels. It is important to note in this regard that any grievance under this section is subject to the procedures set forth in section 3 of the [RLA]." 126 Cong. Rec. 27,056 (1980) (remarks of Sen. Cannon); "Under this provision, an employee who was fired or felt he was discriminated against could file a grievance through the existing Railway Labor Act grievance machinery. The grievance board could order the employee reinstated, and under already existing practice, award back pay." 126 Cong. Rec. 26,531 (1980) (remarks of Rep. Florio). *Accord*, H.R. Rep. No. 1025, 96th Cong. 2d Sess. (1980), 1980 U.S. Code Cong. & Ad. News at 3840-41. See also *Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989), *cert. denied*, 493 U.S. 876 (1989) (section 441 and the "comprehensive remedial provisions" of the RLA incorporated therein are the railroad employee's exclusive remedy and therefore state law claims for wrongful discharge are preempted); *Boston & Maine Corp. v. Lenfest*, 799 F.2d 795 (1st Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987) (enjoining spurious safety protest); *Alaska Airlines, Inc. and Air Line Pilots Ass'n*, 88 AAR (Lab. Rel. Press) 0108 (1988) (Sinicropi, Arb.) (Adjustment Board mitigates discipline of pilot who refused to fly aircraft on grounds that defect in windshield rendered it nonairworthy.)

uniquely qualified to resolve the precise issues presented in respondent's case -- that is, the balancing of the employer's interest in requiring work to be performed with the individual employee's and public concern that safety problems be reported.

C. Preemption Is Consistent With This Court's Decisions And The RLA's Purposes.

In *Andrews*, this Court overruled its earlier decision in *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941), which had permitted employees to circumvent RLA Adjustment Board processes by bringing "wrongful discharge" actions in state court. The *Andrews* Court viewed the RLA grievance process to be an exclusive remedy, "rather than merely requiring exhaustion of remedies in one forum before resorting to another." 406 U.S. at 325. Accordingly, the Court held that "The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances." *Id.* at 323-24.

1. This Court's Prior Constructions Of The RLA Support Broad Preemption.

Application of the *Andrews* prohibition upon pursuing "wrongful discharge" claims outside the RLA's mandatory grievance process would be completely consistent with numerous other decisions of the Court recognizing the broad sweep of the RLA dispute-resolution provisions. For example, in *Elgin*, the Court defined minor disputes as not only those entailed in "contracts which govern their employment relation but also in giving effect to them and to all other incidents of that relation" 325 U.S. at 733-34.

Adjustment Boards were to exercise jurisdiction where "the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective bargaining agreement, e.g., claims on account of personal injuries." *Id.* at 723. Likewise, in *Order of R. Conductors v. Southern Ry. Co.*, 339 U.S. 255, 256 (1950), where the railroad had sued in state court, and the union filed before the Adjustment Board, this Court noted that "if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by § 3, First (i) of the Railway Labor Act."

Similarly, when a former employee attempted to bypass the Adjustment Board in favor of state court action in *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959), the Court again recognized that RLA § 3, First is not limited to contract matters: "The purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated." *Id.* at 552. The Court saw that various state court jury verdicts concerning pay disputes would undermine the role of Adjustment Boards under the RLA:

[N]ot to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act. *Id.* at 553.

Preemption of Respondent's claims in this case, moreover, would show no disrespect to the general proposition that state law should not be presumed displaced by federal law. Rather, preemption in this case is a necessary and intended consequence of the mandatory Adjustment Board mechanism created by Congress to regulate peculiarly

interstate rail and air carriers.¹³ Disputes between air carriers and their employees under these RLA procedures cannot be subject to varying state laws because the "needs of the subject matter manifestly call for uniformity." *International Assn. of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963).¹⁴ *Accord Slocum v. Delaware L.*

13 The very existence of the RLA as a special statute, the first of our modern labor laws, confirms the uniqueness of labor-management relations issues in the rail and air industries:

Railroad labor historically has not been dealt with in exactly the same fashion as other types of labor in this country; and, of course, when we say railroad labor we refer also to labor that is employed by airlines Employer and employee relationships in the railroad industry often independent of State laws have been the subject of Federal legislation for many years because of the direct effect of labor disputes in that industry upon the free flow of interstate commerce. . . .

96 Cong. Rec. 17,048 (1951) (statement of Rep. Beckworth). Furthermore,

[R]ailroads are much more engaged in interstate commerce than are telegraph or telephone companies. When we pick up the telephone in Washington to make a call to Florida it does not involve any personnel moving out of the District of Columbia and going to Florida or to any other State. . . . However, when a railroad train moves out of Washington on the way to Florida, personnel does cross State lines.

96 Cong. Rec. 16,261 (1950) (statement of Sen. Hill).

14 See 96 Cong. Rec. 16,373 (1950) (statement of Sen. Morse) ("Adjustment Board . . . functions on the principle of uniform application of its policies throughout the country. . . . [W]ithout preemption] Railway Labor Act will be so disrupted by great disparities in administrative policies growing out of differences in State laws that the effectiveness of the act will at an early date be greatly impaired."); Hearings before the
(continued...)

& W. R. Co., 339 U.S. 239, 243 (1950) (Adjustment Board decisions "provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems.")¹⁵

Finally, this Court has been mindful that Congress deferred to rail and air industry and labor desires in formulating the RLA to an unprecedented degree. *Chicago & N.W. R. Co. v. United Transp. Union*, 402 U.S. 570, 576 (1971).¹⁶ Both employers and employees wanted simple and

14(...continued)

Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., p. 33 (1936) (George Harrison, principal labor spokesperson) (stating that the Adjustment Boards were the alternative to "a hodgepodge arrangement by law . . .")

15 Resolution by an Adjustment Board serves not only the interest of the individual claimant, but also serves all employees throughout the carrier's system. A decision in favor of the employee will be a precedent in any further retaliatory discharge grievances that may arise. The Adjustment Board is an extension of the collective bargaining process; what is done there has an impact upon all the employees in that craft throughout the system. See *Slocum*, 339 U.S. at 242 (1950) (settlement of dispute interpreting RLA labor contract "would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties"). See also *Union P. R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978), *reh'g denied*, 439 U.S. 1135 (1979) ("The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.")

16 The railroad industry was seen as a "state within a state" that evolved its own adjustment mechanisms, in which courts were to have no role:

These [RLA controversies] were certainly not expected to be solved by ill adapted judicial interferences, escape from which was indeed one of the driving motives in establishing specialized machinery of mediation and arbitration.

(continued...)

speedy dispute-resolution processes.¹⁷ "Employees were willing to give up their remedies outside of the statute" in favor of a workable and binding Adjustment Board remedy. *Price*, 360 U.S. at 613-614 (1959).¹⁸ The decision below improperly repudiates the Adjustment Board framework which Congress adopted at the behest of both the affected industries and employee representatives.

16(...continued)

Elgin, 325 U.S. at 752 (Frankfurter, J. dissenting); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 760 (1961) (quoting above language with approval).

17 See, e.g., 67 Cong. Rec. 4650 (1926) (statement of Rep. Jacobstein) ("[K]eep lawyers out of the settling of disputes. . . . Lawyers always tried to settle things in terms of legal technicalities whereas disputes should be settled by practical men of affairs in close contact with the situation and with an understanding of the psychology of the parties involved in the dispute.")

18 Mr. Richberg, the principal spokesperson for the unions in support of the RLA of 1926, observed that at the time the RLA was adopted "I have yet to see any law which effectively prevented tyranny on the part of the employer, and unjust and arbitrary action against the employees . . ." Hearings before the House Committee on Interstate & Foreign Commerce, Railroad Labor Disputes, H.R. 7180, 69th Cong. 1st Sess. p. 92 (Jan. 28, 1926). The RLA itself was to fill this gap by providing "for the fair ironing out of all their disputes . . ." without recourse to legal procedures. *Id.* Accord Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73d Cong. 2d Sess., 33 (April 11, 1934) (statement of George Harrison, spokesperson for the 21 standard railway labor unions) ("we are willing to take our chances with this national board because we believe, out of our experience, that the national board is the best and most efficient method of getting a determination of these many controversies . . .")

2. Preemption Of Respondent's Claims Would Serve RLA Purposes.

The present case well illustrates the dysfunctional results of abandoning or restricting *Andrews'* preemption of wrongful discharge claims under state law. When Respondent refused to sign a work record (a task required of mechanics by Article IV, D.4a of the collective bargaining agreement), he was held out of service pending investigation (a process established by Art. XV, F.1 of the collective bargaining agreement), and the normal grievance processes were followed to determine whether he should be disciplined for violation of the work rule. Respondent defended his refusal to sign a work record attesting that he had changed a tire on the grounds that another part of the tire assembly was unsafe.

When Respondent was dissatisfied with the first step of the grievance process, he appealed to the next step. Soon thereafter, he abandoned the grievance process and filed suit in state court on common law grounds of wrongful discharge, claiming that the discipline imposed on him violated public policy. The public policy violation alleged was airline safety -- an issue specifically addressed in Art. XVII, F of the collective bargaining agreement, which said that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action." The holding below thus permits Respondent to take a dispute over his discipline or discharge before a state court jury, completely bypassing the mandatory grievance mechanism and the expertise of an arbitrator knowledgeable in industry practices regarding the interplay of public safety issues and discipline for refusal to perform work. As a result,

the RLA's carefully tailored dispute-resolution system is rendered irrelevant.¹⁹

The purposes of the RLA surely will be undermined if state law is not preempted for discipline and discharge matters assigned by Congress to the Adjustment Board. Under the Hawaii Supreme Court's holding, a grievant may have two proceedings in which to challenge an adverse employment decision. The prospect of inconsistent factual findings and remedies on the same evidence before an arbitrator and a state court is sure to undermine the credibility and finality of the RLA arbitration process.²⁰ RLA Adjustment Boards will become "backup" forums, or may delay their proceedings to avoid inconsistent results. As a result, the carriers and their unionized employees would lose the benefit of the tribunal that is "peculiarly competent" to resolve their disputes. *Order of R. Conductors v. Pitney*, 326 U.S. 561, 566 (1946). Such dual processes are inherently

19 Conversely, comprehensive RLA preemption does not eliminate consideration by the arbitrator of any relevant public policy objectives embodied in state law. For example, an arbitrator might conclude that a discharge was impermissible because an unlawful motive, rather than just cause, was the real reason for the discharge. The arbitrator may look to state, as well as federal, law as a source of public policy concerning the meaning of "just cause" and the parties are free to incorporate state law protection expressly in the collective bargaining agreement. See, e.g., *Richmond, F. & P. R.R. v. Transportation Communications Int'l Union*, 973 F.2d 276, 279 (4th Cir. 1992) ("there is no statutory barrier to submitting [to Adjustment Board] questions involving the interpretation of statutes or case law"); *IAM v. Alaska Airlines, Inc.*, No. 88-4079 (9th Cir. Feb. 21, 1990), *cert. denied*, 498 U.S. 821 (1990) (Adjustment Board had the right to rely on external law as the basis for its award).

20 Even in the context of the more limited LMRA, there is "inherent potential for conflict when 'two separate remedies are brought to bear on the same activity.'" *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 289 (1986), *quoting Garner v. Teamsters*, 346 U.S. 485, 498-499 (1953).

destructive of the mandatory arbitration scheme Congress has established.

Moreover, rail and air carriers would be subject to a multitude of varying state laws that would impede efficient interstate operations by applying different substantive standards to employees in the same bargaining unit. This diversity would be contrary to the RLA's mandate for system-wide labor relations. Instead, the parties would be subject to a "race of diligence" to obtain the forum that one party thought more desirable in any given instance. *Southern R.R.*, 339 U.S. at 256. An employee whose work touched many states would surely choose to sue in the state most favorable to him. Such multiple and potentially inconsistent dispute-resolution mechanisms would fatally disrupt the essential purpose of mandatory arbitration under the RLA -- "the prompt and orderly settlement of all disputes."²¹

21 Keeping disputes within the RLA framework of dispute resolution enhances the value and effectiveness of the Adjustment Boards and the collective bargaining process as a whole; this process allows RLA conciliation procedures to work on a broad range of controversies and promotes industrial peace. See *Brotherhood of R. Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30, 34 (1957), *reh'g denied*, 353 U.S. 948 (1957) (rejecting the view that parties may voluntarily use Adjustment Board but may resort to economic duress, if that seems more desirable).

II. RLA PREEMPTION SHOULD NOT BE GOVERNED BY LABOR MANAGEMENT RELATIONS ACT STANDARDS.

Reiterating the rationale of the Hawaii Supreme Court, the Solicitor General, without citing or distinguishing this Court's decision in *Andrews*, suggests that "*Lingle* supplies an appropriate analogy in this case." Brief for the United States as Amicus Curiae on Petition for Certiorari at 14. As a justification for this analogy, the Solicitor General blithely dismisses the Railway Labor Act, asserting that respondent's state law wrongful discharge claims "are not minor disputes subject to the exclusive arbitral mechanism of the RLA," and that "[t]he proper framework for the existence of a minor dispute is set forth in this Court's decision in *Conrail*" *Id.* at 8. With all due respect, the Solicitor General's effort to shoehorn this case into the *Conrail* boot is misguided, and his analogy to *Lingle* is inappropriate.

The *Conrail* issue was "whether *Conrail*'s addition of a drug screen to the urinalysis component of its required periodic and return-to-duty medical examinations gives rise to a 'major' or a 'minor' dispute under the RLA." 491 U.S. at 301. If the dispute were "major," the parties would have to go through a protracted bargaining and mediation process; if "minor," the dispute would be "subject to compulsory and binding arbitration before the National Railroad Adjustment Board." *Id.* at 303. The major/minor line explored by the *Conrail* Court was solely for the purpose of differentiating which RLA process was applicable, the RLA bargaining process or the Adjustment Board. The Court recognized that, whether "major" or "minor," RLA processes would control the framework for resolving that dispute.

The Solicitor General now seeks to use *Conrail* to permit employees to opt out of RLA processes altogether. By recharacterizing a dispute as not "minor," (although

admittedly not "major") the Solicitor General seeks removal of the dispute from the RLA's nationwide dispute resolution processes to state courts, from arbitrators to juries. As demonstrated above at 8-16, an employee discipline or discharge matter is the classic minor dispute, for RLA "minor disputes" sweep more broadly than LMRA "violation of contract" matters. Removal of such issues from the RLA adjustment process through creation of a new third category of uncovered disputes runs completely contrary to the RLA's plain language, contradicts the legislative history of the RLA, and disserves the policies of the statute. In short, *Conrail* is a red herring, irrelevant to disposition of this case.²²

22 The Solicitor General also relies heavily upon *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963). There the issue was whether an applicant rejected because of his race could assert a claim under the Colorado Anti-Discrimination Act of 1957. Not surprisingly, this Court found that this claim was not barred by the RLA, just as it would no doubt hold that the RLA would not bar suit by any other non-employee who filed a tort claim in state court against a railroad or an airline carrier. See, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The single paragraph of that opinion devoted to the RLA issue did not explore any of the statutory provisions, legislative history, or policy considerations briefed in this case. The Court's *dictum* that there is no indication Congress "intended to bar States from protecting employees against racial discrimination," 372 U.S. at 724, must be placed in context. The very next sentence, "No provision in the Act even mentions discrimination in hiring" (emphasis added), indicates that the Court was really referring to applicants, and the Court obviously did not intend the word "employee" in the preceding sentence to have the broad meaning ascribed to it by the Solicitor General.

This Court should not be misled by any suggestion that preemption of respondent's wrongful discharge claim would undermine this nation's opposition to employment discrimination. This case does not present any question of how the RLA and other federal statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, should be accommodated. Moreover, the subject of discrimination is not inappropriate for arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Congress has reaffirmed the appropriateness of

(continued...)

With respect to *Lingle*, the Solicitor General concludes that it "addresses" a question common to both the RLA and the LMRA: "how to accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interest of the States in adopting standards of conduct for employers subject to their police power." U.S. Brief at 15. This statement of the question both narrows the scope of RLA concerns and broadens the nature of the state interests -- a result that is not surprising, since the LMRA is much more deferential to state law than is the RLA.

Lingle and its predecessors *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), and *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), dealt with the purpose behind § 301 of the LMRA,²³ which is limited to allowing courts to

22(...continued)

alternatives means of dispute resolution in Title VII cases. Civil Rights Act of 1991, 42 U.S.C. § 1981 nt (Supp. III 1992). See also *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 481 (1989) (attacks on arbitration that "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law" are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.") An arbitrator's decision which ignores clearly expressed public policy will not be judicially enforced. See *Misco*, *supra*, at 30 (arbitrator's ruling, if contrary to explicit public policy embodied in law, will not be enforced).

23 The Solicitor General also inappropriately limits his preemption analysis to one branch of LMRA preemption doctrine. RLA preemption, however, is not limited to the *Lingle/Lucas Flour* issues that arise in § 301 preemption cases, but also encompasses the type of issues present in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (States may not regulate activity that the NLRA protects or prohibits because of the potential conflict from having two separate remedies brought to bear on the same activity), and *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (NLRA pre-empts state laws that "upset the balance of power between labor and management expressed in our national labor policy.")

resolve "suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). Obviously, if a state law claim depends upon the meaning of a collective bargaining agreement, it must be preempted by § 301. Conversely, it is appropriate under the LMRA to limit § 301 preemption to cases where the state law claim does depend upon the meaning of the agreement, since that is the limit of the § 301 remedy.²⁴

Significantly, the RLA expressly mandates that Adjustment Boards do *more* than simply resolve disputes about the interpretation and application of agreements. As noted above, they must settle "*all disputes* growing out of *grievances* or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The use of the disjunctive, combined with the legislative history discussed above, shows that "grievance" was not merely another term for disputes about the interpretation or application of agreements. Therefore, preemption under the RLA must occur not only where the state law claim depends upon the interpretation of a contract, but also whenever there is a grievance entrusted by Congress to the Adjustment Board.

Moreover, the RLA takes an entirely different and broader approach than the LMRA in other relevant ways:

First, Adjustment Boards were designed specifically to vindicate individual rights, not just collective rights secured by unions through bargaining. The RLA, 45 U.S.C. § 153(i) and (j), allows an individual to bring a grievance, without a union acting on his or her behalf. Indeed, a union is not

24 Indeed, the non-RLA collective bargaining agreement involved in *Lingle* actually defined the term "grievance" in contractual terms, as disputes between the employer and employee "concerning the effect, interpretation, application, claim of breach or violation of this Agreement." 486 U.S. at 401-02.

permitted to compromise an individual's rights in an Adjustment Board proceeding. *Elgin*, 325 U.S. at 736.

Second, while LMRA arbitration exists only if created voluntarily through a collective bargaining agreement, the RLA mandates the Adjustment Boards. As this Court stated in *Andrews*, 406 U.S. at 323, "[s]ince the compulsory character of the administrative remedy provided by the RLA . . . stems not from any contractual undertaking . . . but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA."

Third, unlike § 301, which provides for court jurisdiction, the RLA does not allow federal or state court intervention in the interpretation of collective bargaining agreements. Instead, the RLA sends disputes about either employee grievances or the interpretation or application of agreements to the Adjustment Boards. *Pitney*, 326 U.S. at 561; *Southern R.R.*, 339 U.S. at 255.

Fourth, as Congress has recognized, the need for uniformity under the RLA is far greater than under the LMRA because of the uniquely interstate nature of these industries.²⁵ Representation under the RLA must be "system-wide," and there is one bargaining unit that encompasses all the states served by a carrier.²⁶ In contrast, representation under the LMRA is by "appropriate bargaining unit," usually confined to a single facility.

Fifth, unlike § 301, preemption must operate to bar all state actions in the nature of wrongful or retaliatory discipline or discharge, since such discipline was explicitly

²⁵ See pages 17 - 18 and notes 14 - 15, *supra*.

²⁶ See note 8, *supra*.

intended by Congress to be included in the "grievances" that were consigned to the Adjustment Boards.²⁷

Accordingly, this Court should reject the framework suggested by the Hawaii Supreme Court and the Solicitor General for resolution of this case. It should read the statute involved, the RLA, and consider the dispute presented, an effort by respondent to bypass the Adjustment Board process. *Lingle* was decided under the LMRA, a statute which is different in its terms, its history and its purposes from the RLA.

CONCLUSION

This Court should reverse the judgment of the Supreme Court of Hawaii. Because Congress has committed all disputes between RLA employers and their employees to mandatory grievance and arbitration procedures that are intended to be the exclusive dispute-resolution mechanism, respondent may not disregard this Congressional framework by filing an action for wrongful discharge in state court.

Respectfully submitted,

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²⁷ See *supra* at pp. 8 - 12. See also First Annual Report of National Mediation Board 40 (1935) (summarizing the nature of disputes adjudicated by the Adjustment Board: "[i]n 15 cases complaints of improper discipline were reviewed, demerits and suspensions being protested in 5, and requests for reinstatement after discharge in 10.")

MAR 4 1994

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent.

and

PAUL J. FINAZZO, HOWARD E. OGDEN and
HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari
To The Supreme Court For the State Of Hawaii

BRIEF OF THE STATE OF NEW JERSEY
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Hawaii Supreme Court erred in concluding that respondent's state law wrongful discharge claims were not preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

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INTEREST OF AMICUS CURIAE

The State of New Jersey has a fundamental interest in securing and maintaining the peaceful, orderly and efficient operation of freight and passenger rail service to and from its territory. Geographically situated in a densely populated region, with significant industrial and agrarian economic sectors, the diversified economy of New Jersey has long depended on the existence of an efficient and orderly regional and national railroad transportation system. This transportation system moves New Jersey-produced goods in interstate commerce and provides the State's citizens and economy with efficient and uninterrupted access to the national economy. The Northeast's integrated regional economy has created in New Jersey, as well as in adjoining states, a large commuting labor force travelling daily by railroad service to and from New Jersey in interstate commerce. The efficient and disruption-free movement of these passengers and freight is an essential and important element of the development of New Jersey's economy and the Legislature of this State has declared that "a sound, balanced transportation system is vital to the future of the State and is a key factor in its continued development." N.J.S.A. 27:1B-2.

Pursuant to the State's Legislature's declaration in New Jersey's Public Transportation Act of 1979, N.J.S.A. 27:25-1 *et seq.* that "it is the responsibility of the State to establish and provide for the operation and improvement of a coherent public transportation system in the most efficient manner[.]" the State of New Jersey operates through the New Jersey Transit Corporation an extensive intrastate and interstate transportation network. New Jersey Transit Rail Operations, a subdivision of New Jersey Transit, and its rail employees are governed by the comprehensive federal scheme enacted by

Congress to regulate this nation's interstate railroad industry.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

The writ of certiorari presently before the Court originates from the decision of the Supreme Court of Hawaii in *Norris v. Finazzo, et al.*, 842 P.2d 634 (Haw. 1992) and *Norris v. Hawaiian Airlines, Inc.*, its unreported companion case. The Court below ruled that the Railway Labor Act, 45 U.S.C. § 151 *et seq.* does not preempt Hawaii's wrongful discharge law which permits an action in tort for the violation of Hawaii's Whistleblowers' Protection Act. The matter arose after respondent Norris was fired from his employment as a mechanic with Hawaiian Airlines and filed a lawsuit alleging that he was dismissed due to reporting safety violations at the airline to the Federal Aviation Administration. In ruling that the Railway Labor Act did not preempt Hawaii's law, the court below relied on *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), which established the preemption standard used in the Labor Management Relations Act, 29 U.S.C. §§ 141-188. For the reasons set forth herein, *amicus* State of New Jersey respectfully submits that the Supreme Court of Hawaii erred and should be reversed.

The resolution of this dispute has far reaching consequences to the labor relations of rail and air carriers in interstate commerce. Respondent and the Solicitor General seek a declaration by the Court that would allow the States to

¹ While the Railway Labor Act clearly governs labor relations in both the airline and railroad industry, this brief in support of the petitioner will focus on the railroad side of the Act.

regulate the employment relationship between carriers and their workers by permitting the imposition of local employment tort laws upon interstate carriers. Such state regulation of the railroad and airline industry, however, is directly contrary to the express language of the Railway Labor Act, which was enacted by Congress to prevent any labor disruption to interstate commerce or to carriers engaged therein. The historical record and this Court's jurisprudence concerning the Act clearly establish that Congress desired that all railroad and airline labor disputes be resolved and adjusted by labor and management in the railroad industry pursuant to the specific scheme established by Congress and without resort to the courts. Indeed, the supervisory role granted by Congress to the Federal courts under the RLA is so limited that the Court has noted that Federal judicial review under the Act is "among the narrowest known to the Law." Quite clearly then, respondent's demand that the States and their courts be given a greater role than the Federal courts possess in this highly federalized area is incongruous with the purpose and express language of the Act.

The respondent and the Solicitor General's reliance on a myopic reading of this Court's decision in *Consolidated Rail Corporation v. Railway Labor Executives' Association* ("*Conrail*"), 491 U.S. 299 (1989) must not serve as the basis for the uprooting of the long existing strict limitation on the States' regulation of railroad and airlines' industrial relations. Quite the opposite from respondent's contentions, this Court's *Conrail* decision has only strengthened the Railway Labor Act by holding that a "minor" dispute under the Act occurs where a discharge or an adverse employment action are "arguably" permitted by the contract of employment, *i.e.*, that the claim by the employer is not frivolous, not in bad faith or not obviously insubstantial. As the gravamen of wrongful discharge actions is the termination of the contract of employment, an employer has a light burden to demonstrate

that a discharge is a "minor" dispute which must be adjusted under the Act. In actions involving a whistleblower's claim, Congress has expressly determined that such wrongful discharge actions constitute "minor" disputes which must be adjusted within the Railway Labor Act. Congress has thus indicated its intent that all state laws sounding in the "tort of public policy" and relating to interstate railroads must be preempted.

ARGUMENT

A. The Express Statutory Language of the Railway Labor Act Together With the Court's Jurisprudence of the Act Clearly Require that All Employment Disputes Between Employees and Carriers Be Resolved Nonjudicially Under the Act and Not Under State Law

1. The Cardinal Purpose of the Railway Labor Act is to Avoid All Disputes Disruptive to Interstate Commerce

The Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.* has created an elaborate and specialized administrative dispute resolution scheme intended by Congress to provide a comprehensive federal mechanism for the nonjudicial settlement of all employer-employee disputes which arise in the railroad employment relationship. "It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies." *International Association of Machinists v. Street*, 367 U.S. 740, 760

(quoting *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 752-753 (1945) (Frankfurter, J., dissenting), *aff'd. on rehearing*, 327 U.S. 661 (1946)). A plain reading of the Railway Labor Act leaves no doubt that it was the intention of Congress to have the entirety of labor-management disputes resolved by conference and nonjudicial means as provided for by the mechanisms created in the Act. This cardinal congressional purpose was motivated by Congress's express desire to prevent labor conflicts and strife injurious to interstate railroad transportation and the economy of the nation. Congress recognized that in the process of settling private disputes on the railroads, appreciable consequences to the public may follow. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937). "The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern." *Ibid.* at 552. As the Court concluded in *Texas & N.O.R. Co. v. Ry Clerks*, 281 U.S. 548, (1929), "Congress considered it to be 'of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes.'" *Id.* at 561 (quoting *Pennsylvania Railroad Company v. United States Railroad Labor Board*, 261 U.S. 72 (1922)).

The very first stated purpose of the RLA declares the intent of the Act to "avoid *any* interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a (1) (emphasis added). In ascertaining the meaning of a legislative provision, the appropriate place to begin is with the language of the enactment itself. *Perrin v. United States*, 444 U.S. 37, 42 (1979). In using the words "avoid any interruption," Congress made it clear that its first and primary priority was to prevent not a few or some interruptions but *any*, i.e., one and all, interruptions and causes of disruption to the peace of railroading in interstate commerce. The avoidance of interruptions to commerce constitutes the *raison*

d'être of the RLA and all its machinery was designed to serve the stated purposes of the Act and prevent labor disputes and strife which may impair the tranquility and peace of the railroads. *International Association of Machinists v. Central Airlines*, 372 U.S. 682, 689 (1963). As this Court held in *Virginian Ry. v. Federation*, *supra*:

The Railway Labor Act, § 2, declares that its purposes, among others, are '[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein,' and 'to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions.' The provisions of the Act and its history ... establish that such are its purposes, *and that the latter is in aid of the former*. What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement. [*Id.* at 553; emphasis added.]

Accordingly, Congress intended that *any* labor dispute which would constitute an interruption to commerce and could jeopardize the tranquility of the rails must be subject to the Act's own dispute resolution mechanisms.

2. The RLA Was Designed For the Resolution of All Employer-Employee Disputes

To implement the Congressional purpose of preventing any interruption to commerce, the Act imposes a binding duty upon labor and management to confer in order to resolve all

their differences. Congress has "consistently adhered to a regulatory policy which places the responsibility squarely upon the carriers and the unions to mutually work out settlements *of all aspects of the labor relationship*. That policy was embodied in the Railway Labor Act of 1926, 44 Stat. 577, which remains the basic regulatory enactment." *Street, supra*, at 740-41 (emphasis added). Section 2 First of the Act, 45 U.S.C. § 152 First makes it the affirmative duty of carriers and their employees and mandates that management and labor must "exert every reasonable effort ... *to settle all disputes whether arising out of the application of such agreements or otherwise*, in order to avoid any interruption to commerce or to the operation of any carrier growing out of *any dispute* between the carrier and the employees thereof." *Id.*; emphasis supplied. Similarly, Section Two, Second requires that "*[a]ll disputes* between a carrier or carriers and its or their employees *shall be considered*, and if possible, decided, with all expedition, in conference. . . ." Emphasis added.

These provisions, it has been held, are not mere exhortations or recommendations but are intended to be obligatory and enforceable. *Chicago & N.W.R. Co. v. United Transportation Union*, 402 U.S. 570 (1963). The obligation to confer and negotiate "is laid on carrier and employees alike ... and in equally plain terms it applies to *all* disputes covered by the Act, whether major or minor." *Burley, supra*, at 325 U.S. 725. Likewise, 45 U.S.C. § 152 Eighth requires every carrier to notify its employees that "*all disputes* between the carrier and its employees will be handled" pursuant to the provisions set forth in § 152. The Act thus creates "a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other." *Street, supra*, at U.S. 760 (quoting *Burley, supra*, at 325 U.S. 752-753). Quite plainly, then, the express language of the Act mandates that railroad owners and workers must make every reasonable effort available to them and to settle

"all disputes" which may exist between them, whether they arise out of the application of a labor contract "or otherwise."

3. The RLA Establishes A Mechanism For the Resolution of All Employer-Employee Disputes By Dividing the Universe of Railroad Disputes Into Two Categories

In the event that a dispute cannot be amicably resolved in conference pursuant to 45 U.S.C. § 152 First and Second, the Act establishes specific mechanisms to handle such situations, each depending on the typing of the dispute into one of two categories. In this regard, Congress divided the total universe of all railroad disputes into those concerning rates of pay, rules, or working conditions, 45 U.S.C. § 151a (4), known as "major disputes", and those growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions, 45 U.S.C. § 151a (5), known as "minor disputes." As the Court succinctly put it, "major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corporation v. Railway Labor Executives' Association*, 491 U.S. 299 (1989) at 302. Under the Act unresolved major disputes are referred to the National Mediation Board, 45 U.S.C. § 155 First, whereas minor disputes are subject to the National Railroad Adjustment Board ("NRAB"). 45 U.S.C. § 153 First (i).

In referring unsettled labor disputes to the NRAB, the Act directs that these disputes must be those "growing out of grievances *or* out of the interpretation *or* application of agreements concerning rates of pay, rules, *or* working conditions." *Id.* (Emphasis added.) This language in § 153 First (i), however, does not exist independently of other provisions in the Act and is identical to the language in § 151a (5) ("general purposes") which, together with § 151a (4) constitute the universe of all disputes which Congress was

seeking to guard against and regulate in implementing the primary purpose of the Act, namely "[t]o avoid any interruption to commerce or to the operation of any carriers engaged therein." § 151a (1). Thus, what Congress clearly intended in the Act was that any dispute which did not fall within § 151a (4) would fall within the jurisdiction of the NRAB. In other words, any dispute which is not a "major dispute" must *ipso facto* be a "minor dispute" and fall under § 151a (5) and be subject to Adjustment Board jurisdiction.²

The logic underlying this scheme is simple and consistent with the overall purpose of the Act: Congress meant for *all* disputes of potential disruptive impact on commerce and carriers to be regulated by the Act. Congress then divided this world of disputes into "major" and "minor" disputes and created mechanisms to address each within the framework of the Act. A dispute defined as "minor" under § 151a (5) must be finally and conclusively resolved by the NRAB under § 153 First (i) whereas a "major dispute" is to be mediated by the National Mediation Board pursuant to § 155. To conclude otherwise would effectively create a third class of disputes in contraindication to the language of the

² Section 3 Second of the Act, 45 U.S.C. § 153 Second, also permits the resolution of disputes by Special Boards of Adjustment, created voluntarily by mutual consent of union and management, to decide "disputes of the character specified [in § 153]." *Id.* Such boards, which may take a variety of forms, such as system, group or regional boards of adjustment, may be dissolved upon 90 days' notice to the other party and, thereafter, dispute resolution returns to the NRAB. *Id.*

Section 3 Second, as amended in 1966 by Pub. L. 89-456, also requires the establishment of Public Law Boards of Adjustment upon the written request of either the carrier or the union. Special and Public Law Boards awards are "final and binding upon both parties to the dispute," *Id.*, and are enforceable in district court in the same manner as awards of the NRAB. *Id.*

Act. In *Conrail*, *supra*, at 299, the Court explicitly declined to create such a third type of railroad dispute, stating, "we shall not aggravate the already difficult task of distinguishing between major disputes and minor disputes by adding a third category of hybrid disputes." *Id.* at 310.

4. Congress Intended That All "Minor" Disputes Be Resolved By the Railroad Community

The resolution of all unresolved "minor disputes" under the Act was expressly entrusted by Congress to the NRAB, a body exclusively composed of railroad's workers and managers. In doing so, Congress recognized that the world of railroading is unique among the trades, with an insular work culture difficult for outsiders to understand yet alone enter and resolve railroad grievances.³ As the Court concluded in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, (1955), "Both its history and the interests it governs show the Railway Labor Act to be unique. 'The railroad world is like a state within a state. Its population ... has its own customs and its own vocabulary, and lives according to rules of its own making.'" *Id.* at 371 (quoting Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567, 568-69 (1937)). Consistent with this understanding, Congress established a dispute resolution system composed only of railroad's labor and management.

³ As noted by Representative Arentz during the 1926 debate on the Act, "[i]n the operation of a railroad ... minor disputes, involve discipline, grievances, and disputes over the application and meaning of an agreement. These disputes are of a character to be understood by those who operate the railroad and those who work on the railroad, and often very difficult for an outsider to grasp." [67 CONG. REC. 4499-4526 (1926) reprinted in Senate Rep. 93d Cong., 2d Sess. (1974), LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT AS AMENDED (1926 THROUGH 1966), at 359 (1974).]

Intending that the NRAB be made up only of industry people, Congress composed the Board of an equal number of members to be designated by carriers and unions, 45 U.S.C. § 153 First (a), as selected by the respective parties of their own accord, 45 U.S.C. § 153 First (b) and (c), with conflicts ultimately resolved by the National Mediation Board. 45 U.S.C. § 153 First (d)-(f). Indeed, demonstrating the complexity inherent within the railroad industry, Congress structured the NRAB into four subunits, each responsible for a particular type of railroad matter. As the Court stated in *Union Pacific Railroad v. Price*, 360 U.S. 612 (1959),

the employees considered that their interests would be best served by a workable statutory scheme providing for the final settlement of grievance by a tribunal composed of people experienced in the railroad industry. The employees' representatives made it clear that, if such a statutory scheme were provided, the employees would accept the awards as to disputes processed through the scheme as final settlements of those disputes which were not to be raised again. [*Id.* at 614.]

The language and structure of the Act thus reveals Congress's intent that the NRAB, made up of railroad's owners and workers, resolve without any outside interference all disputes arising on the roads which are not typed as "major disputes."⁴ As such, the awards made by the NRAB have been decreed by Congress to be final and binding upon both parties to the

⁴ Consistent with Congress's intent that all disputes on the roads be self-adjusted by the railroads and unions without outside interference, Congress in Sections 7, 8, 9, 45 U.S.C. §§ 157, 158, 159, also created a voluntary mechanism for final and binding arbitrations, separate from the mandatory adjustment mechanisms in the Act.

dispute, 45 U.S.C. § 153 First (m), and the Court has emphasized this time and time again. *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 368 U.S. 257, 263 (1965).

5. The Language of the Act Forbids the Removal of Employer-Employee Dispute Resolution Out of the Railroad Industry

Clearly, then, the Act by its inherent structure and constitution, forbids minor disputes to be removed out of the railroad industry for decision. Even where the members of the NRAB are deadlocked or cannot make an award, the Act requires the deadlocked NRAB division to appoint of its own choosing a referee who will be brought in to "sit with the division as a member thereof and make an award." 45 U.S.C. § 153 First (l). Notably, even in the face of deadlock, congressional insistence on maintaining all dispute resolution within the railroad industry is strongly apparent. The Act creates a scheme where, instead of exporting elsewhere a deadlocked dispute for resolution by an outsider, a referee is selected by the parties themselves and is brought *in* to sit as a full NRAB division member to hear the case together with its railroad industry members, who can confer with, educate and seek to convince the referee, prior to the latter's casting of the tie-breaking vote which will decide the dispute *for* the division.⁵ Similarly, in cases involving public law boards, Congress made it clear that refusal of a party to submit to the dispute resolution process will not be tolerated and the National Mediation Board will appoint an individual for the recalcitrant party. 45 U.S.C. § 153 Second. This simple yet compelling facet of the Act must be viewed as strong and

⁵ In cases where the NRAB cannot agree on such a referee, the Act permits the National Mediation Board to appoint such a referee to join the division and decide the case. 45 U.S.C. § 153 (l).

clear manifestation of congressional intent that all disputes arising in the railroad industry must be resolved only within this industry, unless Congress clearly indicates otherwise.

From the Act's express language, it is clear that Congress was determined to keep railway disputes out of the courts and thereby allow the industry to adjust its own disputes with little judicial interference. "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific Railroad v. Sheehan*, 439 U.S. 94, (1979) (quoting *Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30, 40 (1957)).

In such actions, "the findings and order of the division of the Adjustment Board shall be conclusive on the parties. . . ." 45 U.S.C. § 153 First (p). In this regard, § 153 First (p) permits actions in United States District Court to enforce awards by a board of adjustment but on exceptionally narrow grounds. A district court may set aside an order by the Board only for failure of the division to comply with the requirements of the Act; for failure of the Board to conform or confine itself to matters within the scope of the division's jurisdiction; or, for fraud or corruption. *Id.* Likewise, the review afforded by 45 U.S.C. § 153 First (q) in district court is exceptionally narrow and based on the same criteria as in § 153 First (p). In *Sheehan*, *supra*, at 439 U.S. 89, (1979) the Court noted that the scope of judicial review of Adjustment Board decisions is "among the narrowest known to the Law." *Id.* at 91. Without equivocation, the Act's language instructs that the courts of the United States have few and constricted powers of review under the Railway Labor Act.⁶

⁶ In this context, the dissent of Justice Frankfurter in *Burley* is enlightening. Justice Frankfurter wrote: "the policy of the legislation, derived from a long painful experience, is to keep labor controversies on the railroads out of the courts except in the few specifically defined situations where Congress has put them into the courts. Congress has

The Railway Labor Act was enacted for the benefit of carriers, employees and the public, *Transportation-Commun. Emp. U. v. Union Pacific*, 385 U.S. 158, 164 (1966). In so doing Congress created a dispute resolution system delicately balanced between the interests of these three groups, complete in itself, and which the Court has characterized "provides a comprehensive framework for the resolution of labor disputes in the railroad industry." *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 562 (1987).⁷ On its face, the Act provides minimal involvement by the courts of the United States, a clear reflection of congressional intent to contain all dispute resolution exclusively within the Act. To interpret the Act's scheme as allowing the involvement of state and local courts in railway labor disputes is entirely inconsistent with the language of the Act and with this Court's jurisprudence.⁸

made a departure in the Railway Labor Act from the normal availability of judicial remedies, and we ought not read the new law through the spectacles of the old remedies." *Burley, supra*, at 327 U.S. at 677; emphasis added. These words by Justice Frankfurter resonate validly today and are probative to the question now before the Court.

⁷ The Act constitutes a complete and self-contained package agreed to by carriers and labor to settle their disputes peacefully. The delicate balancing of interests made by Congress and the various compromises made by labor and management in return for the ultimate structure of the Act require no modifications or alterations. The Act "is a complicated but carefully devised scheme for adjusting the relations between the two powerful groups constituting the railroad industry. It misconceives the legislation and mutilates its provisions to read into it common law notions for the settlement of private rights." *Burley, supra*, at 325 U.S. 758 (Frankfurter dissenting).

⁸ Notably, while review of NRAB and adjustment boards is limited, it has been held that in post-arbitral award situations the courts may, in exceptional instances, set aside awards which violate clearly established public policy. Cf. *United Paperworking International Union v. MISCO, Inc.*, 484 U.S. 29, 43 (1987); Cf. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983); *Delta Air Lines v. Air Line Pilots*, 861 F.2d

6. Congress Intended that the RLA Preempt State Employment Law

As is evident from the preceding discussion of the Act, Congress intended for the Railway Labor Act extensively and comprehensively to occupy the field of railroad labor disputes. As the Court noted, "[t]he framework for fostering voluntary adjustments between carriers and their employees in the interest of the efficient discharge by the carriers of their important functions with minimum disruption from labor strife has no statutory parallel in other industry. That machinery, the product of a long legislative evolution, is more complex than that of any other industry." *Street, supra*, at 367 U.S. 755. Nor have the states engaged in regulating this industry. As the Court further held,

There is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry. Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. [*United Transportation Union v. Long Island Railroad Company, supra* at 455 U.S. 688.]

665, 671 (11th Cir. 1988), cert. denied 110 S.Ct. 201 (1989); *Northwest Airlines v. Air Line Pilots Assn. Intern.*, 808 F.2d 76 (D.C. Cir. 1987), cert. denied 486 U.S. 1014 (1988); *Union Pacific R. Co. v. United Transportation Union*, 3 F.3d 255, 258-260 (8th Cir. 1993).

As it is clear that, in creating the RLA, Congress determined to regulate the industrial relations of this entire industry, preemption of state laws which intrude into this field is required. In analyzing whether state law has been preempted by a federal enactment, "[t]he purpose of Congress is the ultimate touchstone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). By virtue of the Act's own clear scheme of dividing all disputes into major and minor disputes and resolving them within the framework of the RLA and, pursuant to this Court's long jurisprudence finding congressional intent to occupy the field of railroad regulation and labor relations, *Street, supra*, it must be concluded that Congress has preempted the field from state participation and intervention. The United States Constitution Art. VI, cl. 2 provides that "the Laws of the United States ... shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

In this case, Congress, through the extensive and comprehensive nature of the Act, has determined that all railroad labor disputes arising between employees and carriers must be governed by the RLA, no labor dispute having been left for the states' jurisdiction. "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Cipollone v. Liggett Group, Inc.* ____ U.S. ____, 112 S.Ct. 2608 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). "In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law [citations omitted] or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Liggett, supra*, at 112 S.Ct. 2608 (quoting *Fidelity Federal Savings & Loan Assn. v. De La*

Cuesta, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)). It is hence clear that the language of the Act federalizes all disputes between carriers and their employees and preempts state resolution of labor-management disputes.

7. The RLA is One Part of A Vast Congressional Scheme Regulating the Railroad Industry

Further support for the preemption of state law is found in the positioning of the Railway Labor Act in the midst of a vast field of railroad laws enacted by Congress. The Railway Labor Act, is one part of a whole expansive statutory scheme created by Congress to regulate the nation's railroads. For decades, this vast congressional regulatory scheme has defined the legal rights and obligations of railroad employers and employees with respect to one another as well as their obligations to the public at large. "Railroads have been subject to comprehensive federal regulation for nearly a century", *Long Island RR, supra*, at 455 U.S. 687 and "[t]here can be no serious question that ... the Commerce Clause grants Congress the plenary authority to regulate labor relations in the railroad industry in general." *Id.* at 682-83. Executing its constitutional powers under the Commerce Clause, Congress wove a tight legislative fabric designed to cover all interstate rail transportation by enacting a set of related and interdependent laws controlling every facet of life on the railroads. As the Court has observed, "the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system." *Id.* at 688. The net effect of these congressional enactments has been conclusively to federalize railroad law and remove this substantive area from regulation by the states. The history of congressional railroad enactments clearly demonstrates the

pervasive presence of federal law.⁹

⁹ Recognizing the vital importance of the railroad industry to the national economy, in 1862 Congress enacted the Pacific Railroad Act of 1862, c. 120, 12 Stat. 489, enabling the building of a transcontinental rail system by granting the railroads rights of way through public lands. See *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 450 (1884). To regulate and integrate the nation's rail and shipping network into one cohesive national system of transportation, Congress enacted the Interstate Commerce Act of 1887, 24 Stat. 379, creating over one hundred years ago a comprehensive federal scheme to regulate the railroad industry through the Interstate Commerce Commission (ICC). See *United States v. Pennsylvania R.*, 323 U.S. 612 (1945). To deal with railroad labor disputes, in 1888 Congress passed the Arbitration Act of 1888, 25 Stat. 501, which was intended to bring peace to the battles between railroad owners and employees which were viewed as deleterious to the national rail system. See *Street, supra*, at 367 U.S. 756 n. 11 (1961). In 1893, Congress legislated the Safety Appliance Acts, c. 196 §1, 27 Stat. 531 to require and regulate safety equipment on interstate railroads. In 1898, dissatisfied with the lack of peaceful labor relations on the roads, Congress returned to the railroad labor arena and enacted the Erdman Act, c. 370, 30 Stat. 424, which created a voluntary system of mediation and arbitration of railroad disputes.

With the dawn of the twentieth century in 1907, Congress enacted the Hours of Service Act, c. 2939, § 1, 34 Stat. 1415, limiting the duty hours of various types of railroad employees and thereby improving safety and working conditions. See *Chicago & Alton R.R. v. United States*, 247 U.S. 197 (1918); *Atchison, Topeka & Santa Fe Ry. v. United States*, 244 U.S. 336 (1917). In 1908, Congress passed the Employers' Liability Act, c. 149, § 1, 35 Stat. 65, regulating and standardizing personal injury actions by railroad employees against the railroads. In 1913, Congress once again returned to the labor area and enacted the Newlands Act of 1913, c. 5, 38 Stat. 103, repealing the Erdman Act of 1898 and providing for a new manner of voluntary mediation and arbitration of railroad labor disputes. In 1916, to avert a strike by four railway unions, Congress passed the Adamson Act, c. 436, § 1, 39 Stat. 721, mandating the eight-hour work day for certain types of employees and railroads. See *Wilson v. New*, 243 U.S. 332, 340-45 (1917); *Burke v. Monumental Division, No. 52, Brotherhood of Locomotive Engineers*, 273 F. 707 (D.C. Md. 1919).

In December 1917, during the First World War, the President by

Congress has for over one hundred years regulated all aspects of RR life as manifested by the breadth and depth of its railroad enactments in the last century. As the Sixth Circuit concluded, "Congress has undertaken the regulation of almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions. This lasting history of pervasive and uniquely tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R. Co. v. Palmore*, 999 F.2d 149 (6th Cir. 1993). As this Court said in *California v. Taylor*, 353 U.S. 564 (1957), "Like the Safety Appliance Act, the Railway Labor Act is 'all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.'" *Id.* (quoting *United States v. State of California*, 297 U.S. 175, 186 (1936)).

authority of an Act of Congress, 1916, c. 418, 39 Stat. 619, 645, took over the railroads of the country and operated them through the Director General of Railroads until March 1, 1920. Following the War, Congress enacted the Transportation Act of 1920, c. 91, 41 Stat. 456, which returned the railroads to private ownership and established a new railroad dispute resolution mechanism to replace the Newlands Act of 1913. In 1926, Congress legislated the Railway Labor Act of 1926, c. 347, Title I, § 1, 44 Stat. 577, which replaced the dispute resolution mechanism of the Transportation Act of 1920. In 1934, Congress passed the Railroad Retirement Act of 1934, c. 868, § 1, 48 Stat. 1283, providing railroad employees with federal retirement benefits and in 1938, Congress enacted the Railroad Unemployment Insurance Act, c. 680, § 1, 52 Stat. 1094, legislating federal unemployment benefits to railroad employees. In 1970, Congress passed the Railroad Safety Act of 1970, 45 U.S.C. § 421, to standardize rail safety and reduce accidents and, finally, in 1973, Congress enacted the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701, which, following the bankruptcy of eight major railroads, reorganized the entire collapsed eastern and midwestern railroad industry into Conrail to prevent disruption to interstate commerce. — See *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

Preemption of state law in this case is warranted as a result of Congress's far reaching and thorough occupation of the railroad field. Congressional regulation in this field entails much more than safety regulation and includes social legislation intended to ameliorate the lives of railroad workers and their families. Such enactments as the Railroad Retirement Act, the Railroad Unemployment Insurance Act, FELA, the Adamson Act, the Hours of Service Act, and the Railway Labor Act form together a cohesive net regulating the non-safety aspects of the railroad industry. This set of federal laws strongly suggests that federal law so thoroughly occupies the legislative field that preemption is required. *Cipollone v. Liggett, supra*. As this Court declared, "[t]o allow individual states...to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." *Long Island RR, supra*, at 455 U.S.689. For these reasons, the Court should presently hold that, in the context of the Railway Labor Act, state wrongful discharge law is preempted.

B. The Jurisprudence of the Court Requires That Wrongful Discharge Causes of Action be Preempted as Such Actions Constitute Minor Disputes Under the Railway Labor Act

1. *Conrail* Establishes The "Arguably Justified" Test For Minor Disputes

In *Conrail, supra*, the most recent opinion involving the definition of a "minor" dispute, the Court clarified the manner by which a distinction may be made between "major" and "minor" disputes:

We hold that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is *arguably justified by the terms of the parties' agreement* (i.e., the claim is *neither obviously insubstantial or frivolous, nor made in bad faith*), the employer may make the change and the courts must defer to the arbitral jurisdiction of the board. [*Conrail, supra*, at 491 U.S. 310; (emphasis added).]

In announcing this test for analyzing disputes as "major" or "minor," the Court highlighted that the "arguably justified" test imposes a "relatively light burden which the railroad must bear[] in establishing exclusive arbitral jurisdiction under the RLA." *Id.* at 307 (quoting *Brotherhood of Maintenance of Way Employees v. Burlington Northern R. Co.*, 802 F.2d 1016, 1022 (8Cir 1986)). A carrier arguing that its action against an employee is "arguably justified" by the terms of the parties' contract, can demonstrate such an assertion of arguability with a showing that its reliance on the contract is not frivolous, or is not obviously insubstantial, or is not made in bad faith. Demonstrating any one of these elements permits a dispute to be adjusted as a minor dispute under the exclusive jurisdiction of the NRAB pursuant to 45 U.S.C. § 153 First (i). "Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Conrail* at 307.¹⁰

Prior to adopting the "arguably justified" test, the

¹⁰ As *Conrail* points out with approval, other courts have utilized terms such as "spurious" and "frivolous" to convey the exact same standard reached by the Court. *Conrail* at 306-07.

Conrail Court reviewed in passing *Burley*'s minor dispute test, noting that,

Burley looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute may be conclusively resolved by interpreting the existing agreement. [*Conrail* at 305.]

Respondent and the Solicitor General argue that with these comments about the *Burley* test, the Court created a new test for minor disputes. This contention is misguided as it ignores the express holding by the *Conrail* Court, expressly establishing the "arguably justified" test. The Respondent's words are thus simply out of context. The first sentence above paraphrases the language in *Burley* which provides that a minor dispute, "[c]ontemplates the existence of a collective agreement already concluded . . . [and] [t]he dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation. . . ." *Burley*, *supra*, at 325 U.S. 723. The second sentence in the above *Conrail* quote reflects upon and comments on the *Burley* test's potential effect, noting that in such situations a dispute "*may be* conclusively resolved" by interpreting the contract of employment. As the language of "may be" is not in the imperative form but, rather is conjectural and permissive, this phrase cannot reasonably be accorded the interpretation sought by respondent: that a grievance *must* always be conclusively resolved before being typed as a minor dispute. Quite simply, respondent and his *amicus*, the Solicitor General, seek to extract from this language far more than what the words contain.

Indeed, the argument of respondent and the Solicitor

General that *Conrail* has created a "conclusively resolved" preemption test, has no support in the *Conrail* decision. Rather, in *Conrail* the Court strengthened the RLA in reaffirming that in the railroad industry the universe of employee-employer disputes may only be divided into two classes, "major" and "minor" disputes, and that such disputes must be resolved exclusively within the confines of the Act.

Nowhere in *Conrail* does the Court create or contemplates creating a new class of railroad labor cases to be decided in state courts. Quite the opposite, in rejecting an invitation by the union to create a third class of "hybrid" disputes, the *Conrail* Court pointedly wrote, "we shall not aggravate the already difficult task of distinguishing between major disputes and minor disputes by adding a third category of hybrid disputes." *Conrail*, *supra*, at 491 U.S. 310. Quite clearly, then, the *Conrail* Court had absolutely no intention of creating a new class of disputes to supplement the two already present in the Act. As such, there is an incongruity in logic in concluding, as Respondent and the Solicitor General conclude, that *Conrail*, while expressly rejecting the creation of a new class of disputes within the RLA has -- with two words ("conclusively resolved") -- broken new ground and created a new class of railway labor disputes *outside* the Act under state jurisdiction. Quite obviously, had the Court intended to alter a guiding and fundamental polestar of railway labor law, *i.e.*, that of keeping courts out of the railroad industry's labor relations and encouraging adjustment of disputes, by permitting *state courts* to regulate the railroads' labor relations, the Court would have so stated in a manner clear and certain.

2. *Conrail* Follows From The Court's Prior Jurisprudence

The Court's holding in *Conrail* continues in the footsteps of *Burley*, *Day*, and *Sheehan* and is entirely

consistent with *Andrews*. In its decision in *Andrews v. Louisville & Nashville Railroad*, 406 U.S.271 (1972), this Court reversed *Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941), and held that a railroad employee's wrongful discharge state cause of action was preempted by the Railway Labor Act. The Court made it clear that the RLA's grievance and arbitration procedures are mandatory and must be utilized by employer and employee alike, *Id.* at 322, and, the characterization of a claim by an employee as one for "wrongful discharge" does not save it from the Act's mandatory provisions for the processing of grievances." *Id.* at 324-25. Additionally, by virtue of its ruling, the Court implicitly acknowledged that in some situations, the exclusive administrative remedy mandated by the Act would preclude other remedies available elsewhere. *Id.* at 325.

In *Pennsylvania Railroad Company v. Day*, 360 U.S. 554 (1959), where NRAB jurisdiction was found in an action for backpay by a retired employee, the Court ruled that railway labor disputes "arising out of the relationship between carrier and employee," constitute minor disputes which are subject to the exclusive jurisdiction of the NRAB under the Act. *Id.* at 360 U.S. 554; (emphasis added). The Court stated, "[t]he purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated." *Id.* at 552. Similarly, in *Burley*, *supra*, the Court ruled that a minor dispute, "relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case . . . found upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. *Id.* at 325 U.S. 723 (emphasis added). Additionally, in *Sheehan*, *supra*, the Court noted that minor disputes cover "grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Id.* at 95.

On the basis of *Andrews*, *Day*, *Sheehan*, *Burley* and *Conrail* it would appear that a dispute relating either to the meaning or proper application of a contractual provision or "arising out of" or "found upon some incident of the employment relation, or asserted one" would be subject to exclusive NRAB jurisdiction even if labeled as an action in wrongful discharge. These cases taken together dictate that any railroad wrongful discharge action, based in contract, tort or public policy, is preempted, regardless of the characterization rendered by the complainant as, by definition, an action challenging a discharge is based on some incident of the employment relationship and the gravamen of the action is the discharge from the employment relationship. As the gravamen of a wrongful discharge action is the termination of the contractual employment relationship, carriers need only demonstrate that, arguably, a termination of the contractual relationship or another adverse employment action was neither obviously insubstantial or frivolous, nor made in bad faith. Once this "relatively light burden," *Conrail*, *supra*, at 491 U.S. 306, is met, the dispute must come under the jurisdiction of the NRAB.

3. A Wrongful Discharge Action Is "Arguably Justified" By The Employment Contract

That the gravamen of a wrongful discharge action, including a whistleblower's action, lies in the employment relationship is clear. The generic cause of action known as "wrongful discharge", while not new on the scene, contains the "public policy tort" doctrine which, until recently, was unknown. H. Perritt, EMPLOYMENT DISMISSAL LAW AND PRACTICE §1.1, at 3 (1992). This type of tort permits a dismissed employee to recover for the dismissal itself, as opposed to the consequences of the dismissal, *e.g.*, defamation. *Id.* at §5.1 at 431. Under the public policy tort doctrine, a dismissal is actionable only when the action

violates a clearly established public policy and, generally, a court must balance the interests of the employee, the employer and the public to determine liability. In this balancing, the employer's interest to discharge the employee, either for cause or in at will situations, is a crucial element in the employer's defense. Integral to the liability analysis is the motive which the employer possessed in effectuating the dismissal; if the employer demonstrates that a personnel action was motivated by a valid business reason, as opposed to the plaintiff's alleged illicit reason, the employer prevails. Only after hearing the employer's explanation and justification for the personnel action can the matter be resolved on the merits. See *id.* at § 5.9 ("Public Policy Tort: Basic Structure of Proof") and § 5.22 ("Burden of Proof on Reasons for the Dismissal and Mixed Motive Problem"). In a case where the employment relationship is governed by a collective bargaining agreement, that contract will be the basis for a defense that the employee was discharged for cause.¹¹ Therefore, there can be no question that wrongful discharge actions "arguably" relate to the employment contract and that such actions must be typed as minor disputes under the Railway Labor Act.

4. Congress Determined Whistleblower Actions To Constitute Minor Disputes

Indeed, this same conclusion was adopted by Congress when it determined to type a railroad whistleblowing as a

¹¹ While the states which have adopted the public policy tort are split, some have adopted the *Burdine* Title VII model of shifting burdens where: the employee makes his case for a violation of public policy, followed by the employer who defends by demonstrating that the dismissal was justified and job-based, and back to the employee who seeks to show that the employer's justification as being pretextual. See *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash 1984); see also *Phipps v. Clark Oil & Ref. Co.*, 408 N.W.2d 569 (Minn 1987).

minor dispute. In the Federal Railroad Safety Act of 1970, as amended, 45 U.S.C. § 421 *et seq.*, Congress enacted a whistleblower's provision which protects railroad employees from adverse action due to the filing of a safety complaint. 45 U.S.C. § 441 (a). Congress has made this provision enforceable under the RLA before the Adjustment Board which can award aggrieved employees reasonable damages, including punitive damages of up to \$20,000. 45 U.S.C. §441 (c)(2). See *Rayner v. Smirl*, 873 F.2d 60 (1989) (holding that §441 preempted state cause of action for wrongful discharge). Notably, the legislative history of §441 amply demonstrates that a whistleblowing cause of action existed under the Railway Labor Act well before its formal statutory enactment. As the legislative history reflects, Congress understood that retaliatory discharge claims were already subsumed within the remedies afforded by the RLA, where reinstatement and back-pay remedies were available. The legislative history also supports a conclusion that retaliatory discharges or retaliatory job personnel actions were viewed by Congress as an intolerable form of discrimination and harassment to be adjusted under the RLA. In this respect, the report by the Senate's Transportation Committee states, "[t]he Committee is opposed to discrimination or harassment of railroad employees for any reason. In particular, harassment of an employee for reporting or testifying regarding a safety violation should be strongly discouraged." S. Rep. No. 100-153, 100th Cong., 2d Sess. 12 reprinted in 1988 U.S. CONG. & ADMIN. NEWS 695, 706.

5. Colorado and Lingle Are Inapplicable Here

As Congress indicated its intention in §441 to protect railway workers from discrimination and harassment by using the mechanisms of the RLA, it is reasonable to conclude that Congress intended that all such state causes "of" action, including those involving race, sex, national origin, and

handicap discrimination, be subject to the RLA's dispute resolution mechanisms. While respondent and the Solicitor General may point to *Colorado Anti-Discrimination Comm'n. v. Continental Airlines*, 372 U.S. 714 (1963) for the proposition that race discrimination causes of action are not preempted by the RLA, the use of this case is misplaced. *Colorado* involved a pre-hiring situation, involving an applicant for employment. The Railway Labor Law, however, does not cover under its scope persons who wish to one day become railroad or airline workers.¹² For these reasons, *Colorado* is distinguishable and should be read as barring state regulation after the employment relationship commenced.

Even assuming *Colorado* could be read to apply in pre-hire situations, given developments in the law¹³ and the Court's decision in *Gilmer v. Interstate/Johnson Lane Corporation*, 111 S.Ct. 1647 (1991) it is appropriate to conclude that arbitral tribunals should handle civil rights grievances under the Act.

In *Gilmer*, the Court strongly rejected challenges to the adequacy of arbitral proceedings and held that, pursuant to a

¹² The RLA expressly defines "employee" as "every person in the service of a carrier ... who performs any work defined as that of an employee...." 45 U.S.C. § 151 Fifth; (emphasis added).

¹³ The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, §118 (42 U.S.C.A. §1981 Note) provides: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlements, negotiations, conciliations, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Virtually identical provisions appear in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12212.

contract containing a mandatory arbitration provision, statutory claims must be arbitrated. Because Congress granted the NRAB the power to make money awards, to order reinstatement of wrongfully terminated employees, 45 U.S.C. § 153 First (o), to issue written awards, and to have parties be heard with the assistance of counsel, 45 U.S.C. § 153 First (j), the basic requirements of *Gilmer* with respect to the adequacy of the arbitral forum are fulfilled under the RLA.

Lastly, Respondent's reliance on *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), and its preemption standard under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 185, is misplaced. While there may be some broad and general similarities between labor codes such as §301 and the Railway Labor Act, LMRA's §301 belongs to a profoundly different statutory scheme and its principles cannot be imported wholesale into the railway labor arena. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) In enacting the National Labor Relations Act, 29 U.S.C. § 151 ("NLRA") as amended by LMRA in 1947, Congress "carved this singular industry out of [LMRA]," *California v. Taylor, supra*, at 353 U.S. 565, and expressly excluded railroad employees from coverage by LMRA and NLRA. 29 U.S.C. § 182. Additionally, in 29 U.S.C. § 185(a) Congress expressly allowed employer-employee contract disputes to be brought in federal court under §301, placing no requirement that arbitration must be included in a collective bargaining agreement. In contrast to LMRA, under the Railway Labor Act Congress decreed that all "minor" grievances must be subject to final and binding adjustment as specified in the Act.

In short, this Court has held that minor disputes under the RLA include causes of action which sound in wrongful termination. Simply because a new tort doctrine arrives on the scene and is utilized to challenge a dismissal does not alter the

underlying premise of the action as one originating out of the employment relationship or, arguably rising from the contract of employment. For these reasons, the Court should hold that wrongful discharge actions are minor grievances under the RLA and are preempted.

CONCLUSION

For the reasons set forth herein, the decision of the Supreme Court of Hawaii should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Hawaii

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EMPLOYMENT LAWYERS ASSOCIATION IN
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**BRIEF AMICUS CURIAE OF THE NATIONAL
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SUPPORT OF RESPONDENT**

I. INTEREST OF THE AMICI CURIAE

The National Employment Lawyers Association (NELA) is a nationwide bar association of more than 1800 lawyers who regularly represent

individual employees. Founded in 1985, with headquarters in San Francisco, NELA has filed several amicus briefs in this Court as well as in Circuit Courts of Appeal and various State Supreme Courts.

Because of its practical experience with employment issues, NELA is an appropriate entity to brief this Court on the importance of the issues and the practical effects of the Court's decision on the hundreds of thousands of transportation employees under the purview of the Railway Labor Act.

II. SUMMARY OF THE ARGUMENT

Prior decisions of this Court support the holding of the Supreme Court of Hawaii that the Railway Labor Act does not preempt disputes independent of a labor agreement. Public policy

also supports that holding.

Because the mandatory arbitration provision of the Railway Labor Act covers only disputes which arise out of a collective bargaining agreement, the provision does not preempt disputes, such as those relating to state labor laws or federal anti-discrimination statutes, which are independent of the labor agreement and do not require interpretation of it.

Extended to its logical conclusion, the position taken by the Petitioner in this case would ultimately result in the ability of all unionized employers, particularly those in the transportation industry, to exempt themselves from state labor laws and federal anti-discrimination laws. Private employers could effectively enfeeble both state and federal

labor and anti-discrimination laws by requiring arbitration to prevent an employee from asserting in state or federal court the rights that such employees enjoy wholly independent of the collective bargaining relationship.

III. ARGUMENT

The Supreme Court of Hawaii correctly held that this case does not involve a minor dispute subject to mandatory arbitration under the Railway Labor Act [RLA], 45 U.S.C. §§153(i). To hold otherwise would deprive employees of protection and rights accorded under both federal and state statutes independent of collective bargaining agreements; these rights include protection against whistleblowing, as in the instant case, and protection from discrimination based on race, gender, religion,

national origin, age, disability and the attainment of benefits under pension and health benefit plans.¹

A. Disputes Not Conclusively Resolved By Interpretation of The Collective Bargaining Agreement Are Not Appropriate For Mandatory Arbitration Under The Railway Labor Act

Whether a claim must be submitted to arbitration under the RLA turns on whether the dispute is major or minor. Petitioner contends that the issue in the instant case involves a minor dispute subject to the mandatory arbitration provisions of the RLA. The terms "major dispute" and "minor dispute" do not

¹ Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq.; Age Discrimination in Employment Act, 29 U.S.C. §§621 et seq.; Americans with Disabilities Act, 42 U.S.C. §§12101 et seq.; Employment Income Retirement Security Act, 29 U.S.C. §1140.

appear in the RLA. This Court has used the terms to describe two classifications of labor disputes. "[M]ajor disputes seek to create contractual rights, minor disputes to enforce them." Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 302 (1989).

Minor disputes may be "conclusively resolved" by interpreting the collective bargaining agreement. Consolidated Rail Corp. 491 U.S. at 305. Thus the whole panoply of standard contractual interpretations of issues relating to work time, work rules and work duties can be classified as "minor disputes" as can the host of everyday employee grievances surrounding such contract terms. In such circumstances, the arbitral provisions of the Railway Labor Act work well.

However, as this Court has noted, a collective bargaining agreement cannot eliminate substantive legal rights accorded to employees independent of the collective bargaining agreement. Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963) (rejecting the claim that the RLA preempted a state law prohibiting racial discrimination). Any holding to the contrary would unduly usurp the regulatory powers of the states. Further, such a decision would require arbitrators to decide issues of state or federal anti-discrimination law wholly outside the confines of the collective bargaining agreement.

This Court has held that the strong policy in favor of arbitration under the RLA must yield when an employee's cause of action arises from a

federal statute which provides "minimum substantive guarantees to individual workers." Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 565 (1987) (quoting Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981)). In Buell, this Court held that a railroad employee could maintain a negligence action under the Federal Employers' Liability Act, 45 U.S.C. §§51-60, [FELA], even though the claim might have been subject to arbitration under the RLA. 480 U.S. 557 at 564-567. This Court found it "inconceivable" that Congress, which provided substantive protection and a remedy for workers under FELA, intended to limit federal relief to remedies providing for arbitration under the RLA. 480 U.S. 557 at 565.

This Court has also stated that "preemption

should not be lightly inferred" because "the establishment of labor standards falls within the traditional police power of the State" and "does not impermissibly intrude upon the collective-bargaining process." Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21, 23 (1987). Congress must express "a clear intent to preempt state law" when it comes into conflict with federal law. Louisiana Public Services Comm'n v. F.C.C., 476 U.S. 355, 368 (1986). No such "clear intent" is present in the Railway Labor Act.

This Court has also stated that arbitrators exceed their authority if they base their decisions on a source of law outside the collective bargaining agreement. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974).

Determination of whether or not Petitioner violated Hawaii's state whistleblower act, as is alleged by Respondent Norris, would most certainly require just such an interpretation of a state statute, a source of law outside the collective bargaining agreement. On the other hand, a determination of whether there was such a violation would not require any interpretation of the collective bargaining agreement because neither party can bargain away rights accorded under state law.²

In balancing two competing interests, the

² While the "major-minor dichotomy" is certainly helpful in the analysis of collective bargaining issues, as this case readily establishes, it proves a false construct for the resolution of issues wholly outside the contract and the collective bargaining relationship, such as "whistleblower" rights accorded by state statute.

state's power to regulate the establishment of labor standards under its traditional police powers and the federal interest in uniform interpretation of collective bargaining agreements, the former would be wholly nullified if the latter were to prevail in this case. Whistleblowing, an issue unrelated to the collective bargaining agreement, must be adjudicated under the laws of the state as delineated by state decisional law rather than through a collective bargaining arbitral process.

B. Protecting and Enforcing the Rights of "Whistleblowers" Constitutes an Important Public Policy Independent of the Collective Bargaining Contract

At first blush, many employers might characterize the "whistleblower" employee as either "insubordinate" as did the employer

herein or as an uncooperative troublemaker. Nothing could be further from the truth, however, for it is the stubborn courage of such solitary truthseekers which prevents disasters of a public magnitude. Respondent Norris refused to give his imprimatur to repairs performed on an assertedly worn and unsafe aircraft axle sleeve affecting the aircraft's entire landing gear system. He also reported such asserted safety infractions to the Federal Aviation Authority and alleges that his discharge was caused by such whistleblowing activity in contravention of the Hawaii Whistleblowers' Protection Act [HWWPA], Hawaii Revised Statutes (HRS) §378-61 through 69 (Supp 1992), and the airline safety policies underlying the Federal Aviation Act.

That states choose to protect such whistleblowers is surely within the confines of their regulatory police and safety powers. States such as Hawaii and New Jersey, for example, are in the vanguard of states seeking to afford such protection to their citizens.³ To discourage these protections by over-incursion of the pre-emption doctrine risks stifling legitimate reservations, dissents and constructive criticisms which protect both employees and the public from dangers to health and safety. The evisceration of the rights of trained employees to speak out on matters of public policy concern, however unpopular such

³ See Maher v. New Jersey Transit Rail Operations, Inc., 125 N.J. 455, 593 A.2d 750 (1991) enforcing New Jersey's whistleblower statute and finding said statute not preempted by the RLA.

position may be with their immediate supervisor, may be a prescription for disaster.⁴

C. Requiring Arbitration Under The Railway Labor Act Restricts Substantive Remedies And Procedural Rights

1. Substantive Remedies

Tort claims have historically provided

⁴ Thus, in its investigation of the Space Shuttle Challenger Accident in 1987, the Rogers Commission Report noted that the National Aeronautics and Space Administration (NASA) interfered with "the mission" by stifling the legitimate reservations, dissent and constructive criticisms of the project engineers. See Presidential Commission on the Space Shuttle Challenger Accident, Report to the President (Washington, D.C.: U.S. GPO, 1986) pp. 171-72, 199-201. In fact, as noted in McConnell, Challenger: A Major Malfunction (Garden City, New York: Doubleday, 1987) p. 1987, one NASA engineer testified that he did not express safety concerns because he had previously been "personally chastised" and "crucified" by his supervisors for raising design objections.

substantive remedies not ordinarily available under a collective bargaining agreement, including, in the instant case, the right to compensatory and/or exemplary damages. Norris v. Hawaiian Airlines, Inc., 842 P.2d 634, 647.⁵ Depriving employees of damages beyond the traditional "reinstatement and backpay" remedies normally available in the arbitral process deprives employees of remedies for intangible and ancillary compensatory losses such as losses for severe emotional distress, out of pocket expenses and the financial ramifications of a ruined credit rating.

⁵ The Hawaii Whistleblower's Protection Act (HWPB), Hawaii Revised Statutes §§378-61 through 69 (Supp. 1992), also ensures that any rights and remedies in a collective bargaining agreement which are in addition to the rights and remedies of the HWPB are not limited by the Act.

Arbitration ignores such substantive remedies. It also relieves the employer of the possibility of monetary liability large enough to deter wrongdoing in the first instance.⁶

2. Procedural Rights

The possibility of increased financial liability and the trial by jury to which employees have a right under most state tort and federal anti-discrimination laws encourage many employer groups, including those filing amicii briefs herein, to advocate for mandatory

⁶ Compensatory and exemplary damages are also available for intentional discrimination under Title VII and Americans with Disabilities Act, which both provide for punitive and compensatory damages in amounts up to \$300,000, 42 U.S.C. §1981a(b); and under 42 U.S.C. §1981, which provides for unlimited compensatory and possible exemplary damages for intentional race discrimination. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

arbitration as a way of avoiding both increased liability and jury trials. Should such groups prevail, employees would thus be essentially deprived of the only weapons they wield against the superior economic power of their employer: the deterrent effect of laws enforced in state or federal court which protect their rights.

3. Right of Discovery

Arbitration also radically restricts employees' right to discovery. In the employment setting, most documents are within the control of the employer, and most witnesses work for, and are therefore paid by, the employer. Limited or nonexistent access to discovery of such employer documents or witnesses often precludes the employee from presenting as effective a case in arbitration as

in a trial court and creates a distinct disadvantage for the employee. Mandatory arbitration, with its limits on discovery of company records, statistics, and prior incidents, becomes the means by which employers avoid or limit the effect of laws enacted to protect workers.

4. Right to jury trial

This Court has long noted the importance of preservation of the right to jury trial. Such a right to jury trial, whether created by state or federal statute, is especially critical in the employment case so that the discharged employee can be judged by a jury of his or her peers.

Congress and the various states created these rights and remedies, including the right to a jury trial in whistleblower and anti-

discrimination statutes.⁷ Indeed, Congress went through a tumultuous struggle over the right to a jury trial in the Civil Rights Act of 1991 which amended the Civil Rights Act of 1964. Without a clear Congressional intent to the contrary - absent in the RLA - the right to jury trial and the right to a judicial forum to resolve employment disputes outside the confines of the collective bargaining contract should be preserved.

IV. CONCLUSION

⁷ Damages and jury trials in Title VII and Americans with Disability Act cases are provided by 42 U.S.C. §1981a(b) and (c). Liquidated damages and jury trials in Age Discrimination in Employment Cases are provided by 29 U.S.C. §626(b) and (c). Damages and jury trials are also available in cases under 42 U.S.C. §1981. Johnson v. Railway Express Agency, Inc., 421 U.S. 454; Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990).

Claims which are unrelated to a collective bargaining agreement and which cannot be adjudicated by interpreting that agreement should not, as a matter of construction or public policy, be preempted by the Railway Labor Act. NELA respectfully seeks affirmance of the decision of the Supreme Court of Hawaii in this case.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC., *et al.*,
Petitioners,
v.

GRANT T. NORRIS,
Respondent.

On Writ of Certiorari to the Supreme Court
for the State of Hawaii

BRIEF OF
THE RAILWAY LABOR EXECUTIVES' ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Respondent.

On Writ of Certiorari to the Supreme Court
for the State of Hawaii

BRIEF OF
THE RAILWAY LABOR EXECUTIVES' ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Railway Labor Executives' Association "RLEA") is an unincorporated association comprised of the chief executive officers of the following labor organizations: American Train Dispatchers (Dept. of BLE); Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; Sheet Metal Workers Interna-

tional Association; and United Transportation Union. These organizations represent the overwhelming majority of unionized railroad employees in the United States.

One of the purposes of the RLEA is to present, when necessary, a unified position on matters of interest to employees subject to the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* Accordingly, RLEA is concerned that the provisions of that Act are interpreted and enforced in a manner that protects both the federal and state statutory rights of railroad employees. RLEA submits that the decision of the Supreme Court of Hawaii under review here properly struck a balance between the legitimate police powers of a state in setting minimum standards of conduct by employees and the contractual dispute resolution procedures provided under the RLA in a manner that preserved the Respondent employee's rights under state law without frustrating the contractual interpretation processes of the RLA. Accordingly, RLEA respectfully submits this brief as *amicus curiae* in support of Respondent.¹

SUMMARY OF ARGUMENT

RLEA submits that the RLA does not effect a complete preemption of state minimum labor standards applicable to employees. *Term. R.R. Ass'n v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 7 (1943). Therefore, enforcement of the judicially created Hawaiian state law protecting "whistleblowers" is preempted by the RLA only if enforcement of the state right frustrates the statutory regime created by Congress under the RLA. A thorough review of the purposes and functioning of that Act demonstrate that enforcement of a state law right independent of a right created by agreement does not frustrate the working of the RLA.

¹ This brief is presented with the permission of the parties pursuant to Rule 37.3 of the rules of this Court.

The only direct RLA regulation of employee-employer conduct concerns the prohibitions against interference in the designation and choice of collective bargaining representatives contained in Section 2 Third and Fourth of the RLA. 45 U.S.C. § 152 Third & Fourth. The state whistleblower protection at issue here does not touch on this regulated conduct. Therefore, the only way in which the RLA could preempt the state law is if boards of adjustment established under Sections 3 and 204 of that Act, 45 U.S.C. §§ 153 & 184, have been given jurisdiction by Congress of *all* disputes arising out of the employee-employer relationship. However a review of the legislative history of the RLA, decisions of the National Railroad Adjustment Board ("NRAB") and decisions of this Court demonstrate that the boards of adjustment do not have that expansive jurisdiction.

The term "grievances" used in the jurisdictional grant contained in both Sections 3 and 204 refers to the claims of individuals under color of an employment contractual right. This is the manner in which the proponents of both the original 1926 RLA and its 1934 amendments creating the current Section 3 described the term. Subsequently that definition was picked up in the House Report to the 1934 amendments and adopted by this Court in *Bhd. of R.R. Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30, 33 (1957). The same working definition has been utilized by all four divisions of the NRAB when resolving questions of its jurisdiction to act.

The decisions of this Court, notably *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239 (1950), hold that the NRAB has exclusive jurisdiction to resolve contractual interpretation disputes. Indeed, in *Andrew v. Louisville & N.R.R.*, 406 U.S. 320 (1972) this Court held that any claim asserted based upon rights contained in a collective agreement must be presented to the NRAB for resolution. However, in *Andrews*, this Court did not hold that an employee's claim of rights under a state law

that was independent of rights arising under the collective agreement was preempted. Instead, RLEA submits that this Court's earlier decision in *Terminal Railroad* and the later decision in *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987) support the conclusion that independent rights arising under either state or federal law may be enforced in forums other than the NRAB and such independent claims are not preempted by the RLA.

Petitioner Hawaiian Airlines' ("Hawaiian") reliance on the reference to the "omitted case" mentioned in *Elgin, J. & E.R.R. v. Burley*, 325 U.S. 711 (1945) is equally unavailing. The omitted case is merely a short-hand reference to a claim of right arising under either an implied-in-fact collective agreement or an agreement applicable to an individual on matters the parties agreed to omit from the collective agreement.

RLEA submits that the history and purpose of the RLA show that the preemption analysis utilized by this Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1987) for cases arising under Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, has equal applicability to the RLA. While the duty to arbitrate under the RLA is statutorily created, rather than created by contract as under Section 301, the obligation to arbitrate fulfills the same national labor policy: the peaceful resolution of disputes over the interpretation and application of agreements. Accordingly, the decision of the Supreme Court of Hawaii should be affirmed.

ARGUMENT

I. THE RAILWAY LABOR ACT DOES NOT COMPLETELY PREEMPT STATE REGULATION OF MINIMUM LABOR STANDARDS APPLICABLE TO EMPLOYEES OF CARRIERS SUBJECT TO THAT ACT

Over fifty years ago, this Court held that "the enactment by Congress of the Railway Labor Act was not a pre-emption of the field of regulating working conditions" by the states. *Terminal Railroad*, 318 U.S. at 7. In that case, the employees had obtained an order from the Illinois Commerce Commission mandating that the carrier supply a caboose on all trains operated by the carrier within the state. *Id.* at 3. This Court held that while the applicable collective bargaining agreement contained a provision regarding the placement of cabooses on the carrier's trains and, therefore, the dispute might have been brought before the National Railroad Adjustment Board ("NRAB") for adjustment, the employees were not obligated to do so in derogation of their rights under state law. *Id.* at 6.

This Court observed that in enacting the RLA, Congress did not undertake governmental regulation of rates of pay, rules or working conditions or otherwise set minimum standards applicable to them. 318 U.S. at 6. Instead, the dominant federal interest Congress fostered by the Act was that disputes over rates of pay, rules or working conditions did not result in an interruption to commerce. *Id.* In other words, Congress was interested in creating a *process* whereby disputes over rates of pay, rules and working conditions were resolved without either side to the dispute using economic self-help. Therefore, while certain working conditions that were regulated by the states could be the subject of collective bargaining under this process, this Court stated that "we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce

has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation." *Id.* at 7.

Again, in *Bhd. of Locomotive Engineers v. Chicago, R.I. & P.R.R.*, 382 U.S. 423 (1965), (hereinafter *Rock Island*) this Court considered, for the fourth time, whether two Arkansas statutes setting the minimum number of employees that a carrier must use on a train ("full crew laws") were preempted by federal labor legislation.² In that case, the carriers contended that special legislation passed by Congress to resolve an RLA collective bargaining dispute over the manning of trains preempted all state full crew laws. *Id.* at 427. This Court disagreed, noting that nothing in the legislation specifically stated that it should have such preemptive effect. *Id.* at 433. All Congress wanted to accomplish through the legislation was resolution of the collective bargaining dispute. *Id.* However, this Court noted that in some states, such as Arkansas, the size of the crew was already regulated by statute, not by agreement, so that the question of how many employees must be assigned to a train by the carrier in that state already had been resolved. *Id.* Therefore, this Court found that Congress did not intend to preempt existing state minimum labor standards on this matter as part of its resolution of the specific collective bargaining dispute between the parties. *Id.* at 437.

Thus, on at least three occasions, this Court has held that the RLA generally, and special legislation passed by Congress to resolve an RLA dispute, in particular, did not act as general preemption of state minimum labor standards laws. Significantly, Hawaiian and *amici* do not mention these cases despite their obvious relevance.

² In the last "Full Crew" decision prior to *Rock Island*, *Missouri Pacific R.R. v. Norwood*, 283 U.S. 249, 258 (1931), this Court had stated that "[n]o analysis or discussion of the provisions of the [RLA] is necessary to show that it does not conflict with the Arkansas statutes under consideration."

Nevertheless, in order to reach the result which Hawaiian and *amici* seek here, this Court would necessarily have to overrule, or, at the very least, substantially limit, both *Terminal Railroad* and *Rock Island*. Indeed, Hawaiian's and *amici's* claim is that even though there is no express mention by Congress in the RLA of an intention to fully occupy the field of regulating all working conditions applicable to employees one should be implied. However, as will be demonstrated below, the statutory scheme of the RLA does not support such a conclusion. Moreover, it must be noted that when Congress in the past has enacted legislation intended to effect a complete preemption of state law, it has made itself quite clear. See, 49 U.S.C. § 11341(a) (Carrier involved in Section 11343 proceeding under the Interstate Commerce Act "is exempt from the antitrust laws, and from all other law, including State and municipal law, as necessary to let that person carry out the transaction.") There is not even a hint of a similar preemptive effect in the RLA.

Indeed, the logical result of a complete preemption finding here would be that any agreement made by a union and carrier under the RLA would have the "force of federal law, ousting any inconsistent state regulation." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985). This Court held in *Allis-Chalmers* that Section 301 of the LMRA did not confer upon the parties "the ability to contract for what is illegal under state law." *Id.* Based upon the complimentary policies expressed in Section 301 and the RLA as discussed in Part III, *infra*, and further based upon this Court's discussion of the purposes of the RLA in *Terminal Railroad*, no different result should occur under the RLA. Therefore, any claim that the RLA completely preempts the field of state regulation of working conditions must be rejected as it was in *Terminal Railroad*.

II. AN EMPLOYEE'S ENFORCEMENT OF THE HAWAII STATE PROTECTION OF "WHISTLE-BLOWERS" DOES NOT FRUSTRATE THE CLAIM AND GRIEVANCE RESOLUTION PROCEDURES ESTABLISHED BY CONGRESS IN SECTIONS 3 AND 204 OF THE RLA

A. The State Public Policy Protecting Whistleblowers From Wrongful Discharge Does Not Interfere Or Conflict With The Purposes Of The RLA

Even though the RLA may not act to completely preempt state minimum labor standards, certain state regulations may be struck down if they interfere with the federal scheme established under the Act. See, *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 751 and n.32 (1985) (relying upon *Terminal Railroad* for the proposition that federal labor law is "interstitial", and supplements state law where compatible and supplants it only where the purpose of the federal act is frustrated by state action). Here, the Supreme Court of Hawaii has established a judicially created right for all Hawaii residents to be protected in their employment against discrimination because the employee reported an employer's alleged unlawful act to a regulatory agency. In other words, the Hawaii Supreme Court has established a minimum standard of conduct that *all employers* must follow in their dealings with their employees. That minimum standard does not frustrate the purposes of the RLA.

"The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & T.S.L.R.R. v. United Trans. Union*, 396 U.S. 142, 148 (1969). The means chosen by Congress to achieve that purpose included a "purposely long and drawn out" process of negotiating and changing the terms of collective bargaining agreement, *id.* at 149, quoting, *Bhd. of Ry.*

Clerks v. Florida East Coast R.R., 384 U.S. 238, 246 (1966), as well as compulsory and binding arbitration of disputes regarding the interpretation of those agreements. *Chicago River*, 353 U.S. at 39.

The only employer conduct towards employees expressly regulated by the RLA concerns interference by the employer with the employees' rights to organize and bargain collectively (45 U.S.C. § 152 Third & Fourth) and discrimination because a prospective employee is or is not a union member. 4 U.S.C. § 152 Fifth. Those rights may be enforced either by the employees through a civil action in federal court, *Texas & N.O.R.R. v. Bhd. of Ry. Clerks*, 281 U.S. 548, 567-71 (1930), or in criminal proceedings initiated by a U.S. Attorney acting under Section 2 Tenth, 45 U.S.C. § 152 Tenth. The balance of the Act is devoted to fostering collective bargaining by regulating the mechanics of making or maintaining collective agreements and by limiting the possibilities that disputes surrounding the making or interpretation of those agreements may interrupt commerce. *Terminal Railroad*, 318 U.S. at 6. *Shore Line*, 396 U.S. at 150-51; *Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302-7 (1989). Therefore, the whistleblower protection provided under Hawaii law, which does not involve itself with collective bargaining, surely does not in any way frustrate any express regulation of employer conduct set forth in the RLA. The remaining major area of inquiry is whether an employee's assertion of a right under state law that is independent of the terms of a collective bargaining agreement somehow frustrates the contract interpretation and application dispute resolution procedures contained within the Act. RLEA submits that a thorough review of the evolution of those processes reveals that there is no apparent conflict, and, accordingly, the RLA does not preempt the whistleblower protections created by the Supreme Court of Hawaii.

B. Section 3 of the RLA Does Not Confer Jurisdiction Upon The NRAB To Resolve All Claims Arising Out Of The Employee-Employer Relationship

Section 3 First (i) as well as Section 204 confers jurisdiction upon arbitration panels to resolve "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." Hawaiian and *amici* contend that permitting an employee to bring an action under state law for wrongful discharge necessarily interferes with the operation and jurisdiction of these arbitral panels because they have jurisdiction to resolve noncontractual grievances arising out of the employee-employer relationship. This argument, based largely upon excerpts of floor debates concerning the 1926 Act and the reference to the "omitted case" in *Burley*, is largely ahistorical and ignores the fact that the term "grievances" used in Section 3 First(i) has consistently been used by the sponsors of the RLA, the National Railroad Adjustment Board and decisions of this Court to refer to claim of contractual entitlement only.

1. At The Time Of The Enactment Of The RLA in 1926 And Its Amendment in 1934, Individual Contracts Of Employment Could Subsist With Collective Agreements

"The Railway Labor Act of 1926 cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve." *Burlington Northern R.R. v. Bhd. of Maintenance of Way Employees*, 481 U.S. 429, 444 (1987) (internal quotations omitted). Although, the federal control of the railroads during World War I had resulted in increased unionization of railroad employees, by 1926 not all employees were represented by a union, and not even all represented employees were subject to a *collective* agreement setting rates of pay, rules and working conditions.

Indeed, when Congress, in 1916, enacted the Adamson Act, 45 U.S.C. § 65, setting the standard day's work at eight hours, the statute expressly applied to "contracts for labor and service" as opposed to agreements between groups of employees and a carrier or carriers.

This Court did not address the role of individual contracts under the RLA until its decision in *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 346 (1944) wherein this Court held that individual contracts of employment could not be entered into in derogation of rights already provided in the collective contract. However, this Court added that all such individual agreements were not presumptively unlawful because the carrier and representative could agree "that particular situations are reserved for individual contracting, either completely or within prescribed limits." *Id.* at 347.³ Therefore, at the time of the enactment of the RLA in 1926 and its amendment in 1934 (*see*, 45 U.S.C. § 152 Eighth), and beyond, individual contracts of employment were either the sole or supplementary source of contractual rights of railroad employees *vis-a-vis* their employers.

³ In *Telegraphers and J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944), its companion case arising under the NLRA, 29 U.S.C. § 151, *et seq.*, recognized the statutory limits both Acts placed upon the negotiation of individual agreements setting the actual terms and conditions of employment for individual employees. Under the collective bargaining processes of both acts, collective bargaining "results in an accord as to terms which will govern hiring and work and pay in that unit." *J. I. Case*, 321 U.S. at 334-5. Therefore, this Court noted that after negotiation of the collective or "trade" agreement, "[t]here is little left to individual agreement except the act of hiring." *Id.* at 335. As this Court held (*id.* at 337):

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA] looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

This background is requisite to an accurate understanding of the jurisdictional grant conferred upon the NRAB in Section 3 First(i). RLEA submits this statutory formulation equates "grievances" with the claims of individual employees under either individual contracts of employment setting terms and conditions of employment or the terms of the collective agreement applicable to the class of employees in which the individual is employed. The term "interpretation" of agreements applies to claims advanced by the designated collective representative under the collective agreement and generally would refer to "classwide" claims. However, both "grievances" and "interpretation disputes" (hereinafter "claims") must have their basis in an agreement setting rates of pay, rules or working conditions applicable either to the individual or to a class of employees. With this background, the 1934 amendments of the RLA establishing the jurisdictional reach of the NRAB, and, in effect establishing the jurisdiction of airline system boards under Section 204, can be placed in context.

2. The Term "Grievance" As Used By The Proponents Of Both The 1926 RLA And The 1934 Amendments To It, Contemplates Claims Arising Out Of Either An Individual Or Collective Contract Establishing Rates Of Pay, Rules Or Working Conditions For An Individual Claimant

Section 3 of the 1926 Act provided for the voluntary establishment of adjustment boards composed of representatives of the employees and carriers only. Subsection (c) of that Section required that any agreement establishing such an adjustment board limit its jurisdiction to "disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." In testimony before the House Committee on Interstate and Foreign Commerce, Mr. Donald Richberg, labor spokesman for

the proposed bill, referred to "minor disputes" that sometimes were of "a very serious character, that involve discipline, for example, grievances, let us say, disputes over the application and meaning of an agreement." *Hearings before the Committee on Interstate and Foreign Commerce*, H.R. 7180 at 12 (January 26, 1926), reprinted in, 2 *The Railway Labor Act of 1926*. According to Mr. Richberg, the boards of adjustment proposed in Section 3 were to be given jurisdiction to resolve questions over the "very complicated agreements" in existence between the carriers and the employees. *Id.*⁴

The 1926 Act has been characterized by this Court as essentially an agreement between labor and the carriers that was ratified by Congress and the President. *Chicago & N.W. Ry. v. United Trans. Union*, 402 U.S. 570, 576 (1971). Accordingly, the observations of Mr. Richberg should be accorded great weight in determining the "intent" of the parties in this matter. *Id.* Mr. Richberg's statement above, coupled with his 1924 testimony, shows that the term "grievance" meant, even at this early date, a claim of right arising out of a contract.

The adjustment board procedures under the 1926 Act did not provide for compulsory, final and binding resolu-

⁴ In testimony before the Senate subcommittee of the Committee on Interstate Commerce in 1924 on a proposed bill establishing 4 national boards of adjustment, Mr. Richberg, defined a "grievance" as a "dispute [that] arises over the application of an agreement." *Hearings before the Committee on Interstate Commerce*, S. 2646 at 202 (April 4, 1924). Additionally, he answered certain carriers' criticisms that these adjustment boards would have an expansive jurisdiction to make rules, rather than interpret them thus (*id.* at 203):

The second objection of Mr. Holder is that these national boards will standardize conditions, and that is an objection which lacks seriously any good faith. The answer is that this is precisely what the present Labor Board does and precisely what these boards will not do, because the present Labor Board not only interprets rules but makes rules, thus inducing standardization of rules. The proposed boards only interpret rules.

tion of the disputes. Instead, resolution of these disputes was left to voluntary arbitration or negotiation. Accordingly, the number of unadjusted claims accumulated to the point that several labor organizations threatened strikes in order to get them resolved. *Union Pacific R.R. v. Price*, 360 U.S. 601, 610-11 (1959).

With this turmoil as background, the Federal Coordinator of Transportation, Joseph B. Eastman, drafted language for an amendment to the RLA that would provide for the creation of an independent national board of adjustment with exclusive jurisdiction over disputes arising out of the interpretation or application of collective bargaining agreements. *Chicago River*, 353 U.S. at 36-7; *Burley*, 325 U.S. at 726. Mr. Eastman's proposal was adopted by Congress as Section 3 First of the RLA creating the NRAB. *Burley*, 325 U.S. at 726.⁵

Mr. Eastman's testimony, as well as that of others, before the Senate committee considering the amendments used the terms "interpretation" and "grievance" interchangeably to mean an assertion of a contractual right.⁶ In response to the argument raised by the American Short Line Railroad Association that Section 3 should not apply to railroads of less than 100 miles in length, Mr. Eastman responded thus:

⁵ In the Senate floor debate on the amendments, the floor manager Senator Dill stated to the Senate that Mr. Eastman had prepared the original amendments to the Act and he further stated that "[Mr. Eastman] approves the amendments the Senate Committee has adopted and appearing in the bill as reported to the Senate." *Debate on S. 3266, June 18, 1934, as reprinted in, 1 The Railway Labor Act of 1926 at 936.*

⁶ Mr. Eastman has been described as "one of the weightiest voices before Congress on railroad matters." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 304 (1954). Mr. Eastman's testimony in 1934 before the Senate and House Committees on the proposed amendments to the Railway Labor Act was cited extensively by this Court in the *Chicago River* case. 353 U.S. at 34-37.

The Board would not handle major issues relative to wages, rules, and working conditions. All that it would handle would be minor issues relating to the interpretation of such rules as exist and to grievances of employees under established rules.

Hearings before the Committee on Interstate Commerce, S. 3266 at 158 (April 19, 1934), reprinted in 3 *The Railway Labor Act of 1926*.

Similarly, George M. Harrison, President of the Railway Clerks and the spokesman for RLEA, discussed claims and grievances as follows:

Now the other class of controversy is the disputes that arise out of the application of that agreement to the practical situation on the railroad. For instance, we may have a claim for time claiming that the rule of the contract should provide for the payment of so much. The railroad may dispute that and claim that they understand it to be another way. We may have a grievance concerning seniority of a man; we may have a grievance concerning the dismissal of a man, the promotion of a man, reduction of force. There are a thousand and one different kinds of controversies that can develop. Those are the controversies that will be settled by the national board. The parties in the first instance have agreed on the contract; they have laid down rules.

Hearings before the Committee on Interstate Commerce, S. 3266 at 34 (April 11, 1934), reprinted in 3 *The Railway Labor Act of 1926*.

RLEA submits that the testimony of Messrs. Eastman and Harrison supports the contention that "claims" are class-wide disputes and "grievances" are disputes particular only to an individual. However, it is apparent in the testimony of Mr. Harrison, an experienced labor union official, that the two terms are used somewhat interchangeably in practice by 1934.⁷ Certainly what is undisputed

⁷ Mr. Harrison was subsequently appointed by President Roosevelt to serve upon the "Committee of Six" a group composed of

in both men's testimony is that both "claims" and "grievances" must have their basis in a right arising from an existing *agreement* setting rates of pay, rules and working conditions. Similarly, the House Report to the House of Representatives' version of the 1934 amendments noted in its discussion the newly proposed Section 3 that:

[t]he second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages, rules and working conditions.

H.R. Rep. No. 1944, 73d Cong., 2d Sess., at 2-3 (June 11, 1934), reprinted in, 1 The Railway Labor Act of 1926 at 919-20. Moreover, in Chicago River, this Court defined the term "grievance" thus (353 U.S. at 33):

These are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee.

This working definition is identical to the one utilized by the NRAB to determine its jurisdiction since 1934.

3. The NRAB Has Consistently Held That Its Jurisdiction Is Only Coextensive With Claims Of Right Arising Under An Agreement

The NRAB is an "agency peculiarly competent" to resolve disputes concerning the interpretation of collective bargaining agreements. *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566 (1946). The Congressional purpose behind the NRAB was to vest this agency, composed of representatives of labor and carriers, with the authority to make interpretations of collective bargaining

carrier and labor officials charged with recommending to Congress the appropriate level of statutory protective conditions for railroad employees adversely affected by railroad mergers and consolidations approved by the Interstate Commerce Commission. *Ry. Labor Executives' Ass'n v. U.S.*, 339 U.S. 142, 148-9 & n.10 (1950).

agreements that are final and binding upon the parties. 45 U.S.C. § 153 First(m). Accordingly, the decisions of the various divisions of the NRAB regarding their jurisdiction and remedial authority should be given substantial deference.

In practice, the NRAB does not adhere to the dichotomy between "grievances" and "claims" advanced by Hawaiian and *amici*. For example, in an award of the Third Division resolving a "grievance" on behalf of an employee that his seniority ranking was improper, the Board held:

We note, moreover, that Petitioners' claim does not allege that Noyes' inclusion on the disputed seniority roster violated any specific provision of the Agreement. It does not, in short, center upon the interpretation of the contract between the Parties. Accordingly, it does not constitute a dispute 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions.' Yet, it must in order for this Board to establish jurisdiction under Section 3, First (i) of the Railway Labor Act.

NRAB Third Division Award No. 25543 (Aiges, Referee) (1985). Similarly an award of the Second Division dismissing a claim for lack of jurisdiction held "[i]t is well settled that the jurisdiction of this Board is confined to disputes which flow from grievance provisions of a collective bargaining agreement." *NRAB Second Division Award No. 11768 (Carter, Referee)* (1989). Similarly, the First Division dismissed a claim for reinstatement by an employee not subject to any collective agreement. *NRAB First Division Award No. 23909 (Twomey, Referee)* (1986). In a similar situation, the Fourth Division denied a claim for reinstatement by an employee not subject to a collective agreement. *NRAB Fourth Division Award*

No. 4205 (*McAllister, Referee*) (1985).⁸ The NRAB's uniform administrative treatment of the parameters of its jurisdiction emphasizes this Court's observation that the defining characteristic of a dispute referable to the NRAB is "that the dispute may be conclusively resolved by interpreting the existing agreement." *Conrail*, 491 U.S. at 305.

4. *The Transfer Of Certain Pending Disputes Involving Air Carriers From The National Labor Relations Board To Section 204 System Boards Following The 1936 Amendments To The RLA Does Not Vest Jurisdiction In Those Boards To Resolve Claims Not Based Upon An Existing Contract*

Hawaiian has relied upon language in Section 204 transferring to system boards "cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board ["NLRB"]" as somehow giving Section 204 boards a type of unfair labor practice jurisdiction. That interpretation is belied by the language of Section 204 read as a whole, the other portions of Title II of the RLA and by the House Report accompanying such legislation.

The transfer of cases from the NLRB to Section 204 boards is mentioned in the same sentence conferring jurisdiction upon the Boards to disputes over "grievances or . . . the interpretation or application of agreements concerning the rates of pay, rules or working conditions." Moreover, Section 206, 45 U.S.C. § 186, also provided that:

All cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving any dispute arising from any cause between any common carrier by air engaged in interstate or foreign commerce or any carrier by air transporting mail for or

⁸ Copies of these Awards are contained in the Appendix.

under contract with the United States Government, and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the Mediation Board.

Therefore, Section 204 did not transfer all pending air carrier cases before the NLRB to arbitration panels. This distinction is made more apparent by the House Report's discussion of the function of the National Air Transport Adjustment Board authorized to be established under Section 205, 45 U.S.C. § 185, which was to have concurrent jurisdiction with Section 204 boards thus:

This new adjustment board will be created and will function in the same manner as the railway board, excepting that it need not be established immediately but only when deemed necessary by the Mediation Board. The reason for this permissive delay in its formation is that there is nothing for such a board to do until employment contracts have been completed, and there are not such contracts in operation now.

H.R. Rep. No. 2243 at 1 (March 26, 1936), as reprinted in, 1 The Railway Labor Act of 1926, A Legislative History 1050. Accordingly, there is no basis in the limited legislative history of Title II of the RLA to infer that a greater jurisdictional grant was given to boards of adjustment under Section 204 than that granted to boards of adjustment created under Section 3.

5. *This Court Has Consistently Held That The NRAB's Jurisdiction Is Limited To Resolution Of Claims Arising Under Contracts*

This Court's numerous decisions regarding the jurisdiction of the NRAB also have placed no importance on the distinction between "grievances" and "claims", other than that either must have its basis in a contractual right. Indeed, those decisions, like the testimony of Messrs. Eastman and Harrison, tend to use the terms interchange-

ably to refer to disputes regarding the interpretation of application of existing collective bargaining agreements.

In *Pitney*, this Court held that federal courts were without jurisdiction to interpret the meaning of collective bargaining agreements because such responsibility was exclusively within the province of the NRAB. 326 U.S. at 567. Similarly, in *Slocum*, this Court held that state courts lacked jurisdiction to interpret collective bargaining agreements. The dispute in question concerned which union's contract applied to certain work performed by the carrier. Resolution of that dispute would have both retrospective and prospective effect on the relations between the unions and the carrier. As this Court observed, "[t]his type of grievance has long been considered a potent cause of friction leading to strikes." *Id.* Accordingly, in order to ensure that the RLA's purpose was not thwarted, this Court reasoned that Congress had established the NRAB, an agency to "provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway system." *Id.* at 243. That result was required in order to promote the primary purpose of the RLA; *i.e.*, avoidance of interruptions to interstate commerce resulting from "grievances arising under existing agreements." *Id.* at 242. Therefore, based upon the purposes of the Act and the dispute resolution procedures provided therein, this Court held that the NRAB had exclusive jurisdiction to adjust "grievances and disputes of the type here involved." *Id.* at 244.

This need for uniformity in the construction and application of existing collective bargaining agreements was again emphasized in *Pennsylvania R.R. v. Day*, 360 U.S. 548, 553-4 (1959) wherein this Court held that a retired employee was not permitted to bring an action in state court for claims accruing under the collective bargaining while the employee had been in active service. Finally, in 1972, this Court eliminated the last exception to NRAB jurisdiction of claims arising out of collective bargaining agreements in *Andrews*.

However, *Andrews*, does not create an expanded jurisdiction for the NRAB to resolve non-contractual grievances related to employee discipline. In *Andrews*, this Court overruled its earlier decision in *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941) that had permitted discharged employees to commence wrongful discharge actions in state court rather than seek reinstatement under the existing collective bargaining agreement and NRAB procedures. *Id.* at 326. This Court noted that the "concept of 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will." *Id.* at 324. In the case at bar, the employee conceded that "the only source of [his] right not be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement." *Id.* Therefore, in a state court action for wrongful discharge, the court would be required to determine the employee's rights solely by basis of an interpretation of the existing contract. *Id.* In other words, the same vice apparent earlier in *Slocum*, was present here: a state court interpreting a collective bargaining agreement, a task given by Congress exclusively to the NRAB. Accordingly, the decision in *Andrews* rested upon the long-standing view that the NRAB had exclusive jurisdiction to resolve all disputes that required the interpretation or application of an agreement setting rates of pay, rules or working conditions.

Significantly, in *Andrews* there was no discussion of what would occur if the employee asserted a source of protection against wrongful discharge independent of the collective bargaining agreement. That *Andrews* did not implicitly foreclose such an argument is evident from this Court's characterization of it in *Buell*, 480 U.S. at 566 (emphasis added):

In *Andrews*, an employee brought a state wrongful discharge claim based *squarely on an alleged breach*

of the collective-bargaining agreement. We held that Congress had intended the RLA dispute resolution mechanism to be mandatory for that type of dispute, and that courts were therefore foreclosed from addressing claims that properly arise under the RLA.

Indeed, the situation confronting this Court in *Andrews* was remarkably similar to that presented under Section 301 in *Allis-Chalmers*. There, the employee's claim under state law was derived from rights conferred by the collective bargaining agreement and resolution of that claim was preempted by the compulsory arbitration provisions in the collective bargaining agreement. 471 U.S. at 215-16.

The foregoing cases establish the proposition that the NRAB is the exclusive forum for the resolution of disputes arising under contracts. These disputes include "grievances" which are simply another term for an individual's claim of rights arising under a contract. There is nothing in these decisions that supports Hawaiian's claim that the NRAB has jurisdiction of non-contractual "grievances" or claims by employees. RLEA submits that the jurisdictional reach of Section 3 and Section 204 arbitration under the RLA is generally coextensive with Section 301 arbitration under the LMRA and, as shown in Part III, *infra*, the *Lingle* standards for preemption under Section 301 apply with equal force to the RLA.

C. The "Omitted Case" Described in *Burley* Does Not Vest Jurisdiction In The NRAB To Resolve Non-Contractual Claims Or Grievances

The only remaining argument available to Hawaiian and *amici* is that this Court's mention of the "omitted case" in *Burley* establishes a doctrine that non-contractual disputes between employees and employers are within the exclusive jurisdiction of the NRAB. However, the "omitted case" referred to therein is only a short-hand reference to claims arising out of an agreement applicable to an employee other than the written collective bargain-

ing agreement. In other words, the "omitted case" still has its foundation in "rights accrued" under an existing agreement, which is the essence of the minor disputes discussed in *Burley*.

In *Burley* this Court considered the issue of whether a duly designated collective bargaining representative was empowered by the RLA to settle "accrued monetary claims" or submit them to the NRAB to the exclusion of the employees' right to bring those claims in their individual names to that same agency. 325 U.S. at 712. Part of the Court's analysis involved distinguishing those RLA disputes that were subject to NRAB jurisdiction from those which were not. The Court issued its now famous definition of "minor disputes" that included the "omitted case", *i.e.*, a claim "founded upon some incident of the employment relations, or asserted one, independent of those covered by the *collective agreement*, *e.g.*, claims on account of personal injuries." *Id.* at 723 (emphasis added).

In *Burley*, the Court was not confronted with an actual dispute involving an "omitted case" as the claims at issue were for monetary damages under the existing collective bargaining agreement. *Id.* at 712. However, the Court did refer to an individual employee's personal interest in the resolution of a grievance against the carrier "where [it] arises from the incidents of the employment not covered by a collective agreement." *Id.* at 736.

RLEA submits that the omitted case primarily concerns implied-in-fact agreements between the employer and either the union or employees. As this Court has noted, a written RLA collective bargaining agreement does not contain all working conditions to which the parties have agreed. *Pittsburgh & L.E.R.R. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 503 (1989). Therefore, a practice that was mutually satisfactory to the parties could have been omitted from their written memorandum. *Id.* at 504. Indeed, the issue presented in *Conrail* involved an

"omitted case" because there was no provision in the written collective agreement regarding return to duty physical examinations. 491 U.S. at 312. The dispute there concerned whether the carrier's inclusion of a drug-screen urinalysis to these examinations was permitted under the implied-in-fact agreement. *Id.* at 315. Therefore, the dispute concerned the extent of the parties' accrued rights under this "omitted case", i.e., the implied-in-fact agreement.⁹

That the omitted case must have some basis in the contractual relationship between the employer and employees is apparent from this Court's subsequent treatment of individual claims that would otherwise be considered "omitted cases" under the definition proffered by Hawaiian.

In *Buell*, the Court actually addressed the example it had given in *Burley* for the "omitted case": a claim on account of personal injuries brought under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.* In that case, an employee alleged that the carrier had negligently permitted a workplace environment to exist wherein he suffered physical and mental injuries. 480 U.S. at 559. The carrier argued that rather than bring an action under FELA, the employee should have been required to bring a grievance against such conditions because the "exclusive forum for any dispute arising out of workplace conditions is the RLA." *Id.* at 563. This Court rejected that argument. While this Court acknowl-

⁹ The omitted case also could apply to the situation discussed in *Telegraphers*, wherein this Court had observed that in formulating the collective agreement, the parties could agree that certain matters were "reserved to individual contracting" (321 U.S. at 347), i.e., "omitted" from the collective agreement. This view of the omitted case is consistent with this Court's concern in *Burley* that the agent of the employee demonstrate some specific power of attorney to resolve the employee's individual claim of right under an agreement independent of those matters covered by the collective agreement.

edged that the employee could bring a grievance pursuant to the collective bargaining agreement alleging that the working conditions created by the carrier violated the terms of that agreement, that right to grieve did not foreclose the employee's resort to an independent federal statutory right and remedy for the same conduct that could have been grieved. *Id.* at 565. In other words, *Buell* resolved the question of concurrent rights under contract and federal statute in a manner identical to that made in *Terminal Railroad* some 44 years before regarding state rights.¹⁰

The significance of *Buell* is that it demonstrates the limits of the omitted case in practice. Certainly, the expansive assertion of NRAB jurisdiction argued by the carrier in *Buell* was rejected. Indeed, in *Buell*, as in *Terminal Railroad*, this Court applied an analysis remarkably similar to the one undertaken in *Lingle*. In all three cases, the employees had a contractual right to seek a limited contractual remedy. However, the existence of that contractual remedy did not mean that it was exclusive. Instead the contractual remedy was complementary to an independent state or federal right possessed by the employees. *Buell* and *Terminal Railroad*, therefore, stand

¹⁰ Similarly, in *McKinney v. Missouri-K.T.R.R.*, 357 U.S. 265 (1958), this Court held that a returning veteran could assert his reemployment rights under the Universal Military Training and Service Act, 62 Stat. 614-18, without exhausting his contractual claims before the NRAB. As part of its discussion, this Court stated (*id.* at 270):

[t]o insist that the veteran first exhaust other possibly lengthy and doubtful procedures on the ground that his claim is not different from any other employee grievance or claim under a collective bargaining agreement would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights.

Therefore, even though the employee's claim concerned a matter within his relationship with the employer, its noncontractual nature did not require submission of the dispute to the NRAB.

for the proposition that an employee who asserts an independent right under state or federal law that does not rest on a right created under the collective or individual agreement, may assert that federal or state right in proceedings independent of any proceeding before the NRAB.

III. THE POLICIES FAVORING COMPULSORY ARBITRATION OF CONTRACTUAL DISPUTES UNDER SECTION 301 OF THE LMRA ARE IDENTICAL TO THE POLICIES UNDERLYING THE STATUTORY DUTY TO ARBITRATE SIMILAR DISPUTES UNDER SECTIONS 3 AND 204 OF THE RLA

The foregoing extended discussion of the limits of the NRAB's jurisdiction demonstrates why this Court's holding in *Lingle*, also is applicable to the RLA. In *Lingle*, this Court held that "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 purposes." RLEA submits that the preemptive effect of the RLA is the same as Section 301 of the LMRA, 29 U.S.C. § 185, in all cases where there is a collective bargaining agreement establishing a grievance and arbitration remedy.

Lingle presupposes the existence of arbitration provisions that are the exclusive remedy for disputes arising under a collective bargaining agreement, and decides what the impact of a mandatory arbitration provision is on state-law claims that are independent of the agreement. Thus, in *Lingle*, the preemption analysis starts with the assumption that if the claim involved a dispute arising out of the interpretation of a collective bargaining agreement, arbitration would be the exclusive remedy. What is clear from *Lingle* is that this Court did not concern itself with the possibility that the parties could have reached an agreement that did not require them to arbitrate

disputes. That issue is irrelevant to the preemption analysis in *Lingle*.¹¹

Therefore, the fact that the RLA statutorily mandates that an employee submit all disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" to adjustment boards does not meaningfully distinguish cases that concern the preemptive effect of Section 301 from those involving the Railway Labor Act. Indeed, although employees under the jurisdiction of the NLRA have the choice as to whether or not they desire to negotiate an agreement that requires parties to submit contractual disputes to arbitration, once that choice has been made, arbitration becomes the exclusive remedy by operation of Section 301. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965). This Court has made clear that where parties have agreed to submit disputes to arbitration, Section 301 does not permit them to evade that obligation even though the decision to include a mandatory arbitration provision in an agreement was voluntary. *Allis-Chalmers*, 471 U.S. at 220. This is so, because a "rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has responsibility to interpret the labor contract in the first instance." *Lingle*, 486 U.S. at 411, quoting *Allis-Chalmers*, 471 U.S. at 220.

¹¹ Even if the parties had not agreed to arbitration of any disputes involving the interpretation or application of the collective agreement, the preemption analysis would be the same. This is because Section 301 requires that any court interpreting the collective agreement apply a developing federal common law to the meaning of its terms. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 419, 431 (1957). Therefore the concerns regarding uniformity of result in contract interpretation disputes apply with equal force under both Section 301 and Section 3 of the RLA. *Slocum*, 339 U.S. at 243.

In deciding *Lingle*, it is evident that this Court was mindful of the extreme importance to stable industrial relations of the preemptive effect of Section 301 since the Court discussed in detail those seminal decisions concerning that very issue. This Court noted that its earlier decision in *Teamsters v. Lucas Flour, Co.*, 369 U.S. 95 (1962), held that:

The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of the process thus strikes at the very core of federal labor policy.

In another *pre-Lingle* case involving preemption under Section 301, where the collective bargaining contract contained a "mandatory grievance adjustment or arbitration procedure" (*Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 254 (1970)) and the employer sought to enjoin a strike in breach of a no-strike obligation in the agreement, this Court stated that the "very purposes of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures." *Id.* at 245. In *Boys Market*, this Court held that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, must be accommodated to permit an anti-strike injunction issued in order to require specific performance of a contractual arbitration provision under Section 301. In so holding, this Court, relying upon *Chicago River*, stated that the mandatory arbitration provisions of the RLA, like Section 301, are necessary to the "peaceful settlement" of disputes. Therefore, although *Chicago River* "involved arbitration procedures established by statute", the principles elaborated in that case were "equally applicable" to the Section 301 case in light of the "importance that Congress has attached to the voluntary settlement of labor disputes with-

out the resort to self-help and more particularly to arbitration as a means to this end." Thus *Boys Market* not only stands for the proposition that mandatory arbitration provisions are crucial to furtherance of the national labor policy favoring industrial peace through arbitration of contractual interpretation disputes, but that these principles, by reliance on *Chicago River*, are equally applicable to both the NLRA and RLA.

While aware of the importance of mandatory arbitration to industrial peace, this Court in *Lingle* recognized that Section 301 does not preempt claims that find their source in non-contractual claims. The stability derived from industrial self-government through the grievance machinery does not mean, as found by the *Lingle* Court, that federal labor law automatically preempts non-contractual claims brought by unionized workers against their employers.

In view of the fact that strict adherence to mandatory arbitration provisions for the resolution of disputes arising out of agreements is critical to the effectuation of the purpose of Section 301, it is evident that the RLA can have no greater preemptive force than Section 301 unless Section 3 First (i) requires submission of non-contractual disputes to adjustments boards. However, as explained in Section II, *supra*, only disputes arising out of the interpretation or application of agreements must be submitted to adjustment boards constituted under the RLA. Therefore, it follows that the holding in *Lingle* should have application to cases concerning the preemptive effect of the statutorily mandated arbitration of claims and grievances under the RLA.

CONCLUSION

For the reasons set forth above, RLEA submits that the decision of the Supreme Court of Hawaii should be affirmed.

Respectfully submitted,

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*Attorneys for the Railway Labor
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Dated: April 1, 1994

APPENDIX

1a

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award Number 22543
Docket Number MS-25728

Stanley L. Aiges, Referee

PARTIES TO DISPUTE:

(Thomas J. Ryder and John F. Heaphy, Jr.
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

We the undersigned wish to establish seniority in the classification of Inspector.

OPINION OF BOARD:

The Petitioners here are Employees of the Carrier's Signal Department. They protest the failure to list their names on the Signalman Roster for Seniority District 1 (revised 3/12/82) with seniority in the classification of Inspector. Their protest, it is clear, arises out of the fact another employee's name (D. Noyes) so appears on that roster. Noyes' name appears there as the direct result of an agreement reached between Representatives of the Carrier and the Employees (*i.e.*, Brotherhood of Railroad Signalmen). They reached that decision in System Docket 1722 in accordance with the terms of Item 1 of Appendix "R". Their decision was based upon their belief that Noyes had previously held an Inspector position on former B&A territory. Significantly, the contracting parties later revisited the facts in Mr. Noyes' case and decided that he was improperly granted Inspector seniority pursuant to Item 1 of Appendix "R"; therefore, his proper seniority date in the Inspector class was changed from August 30, 1976 to September 7, 1982, pursuant to Rule 3-B-2.

2a

The Agreement of the Parties to place Noyes' name on the disputed seniority roster is a valid one. It simply is not subject to attack here. It is, in our view, final and binding on all concerned.

We note, moreover, that Petitioners' claim does not allege that Noyes' inclusion on the disputed seniority roster violated any specific provision of the Agreement. It does not, in short, center upon the interpretation of the contract between the Parties. Accordingly, it does not constitute a dispute "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions. Yet, it must in order for this Board to establish jurisdiction under Section 3, First (i) of the Railway Labor Act.

Under the circumstances, this claim must be denied.

FINDINGS:

The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

3a

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT
BOARD
By Order of Third Division

ATTEST:

/s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1985.

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Form 1

Award No. 23909
Docket No. 43538
89-1-88-1-M-2012

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE:

(Lawrence E. Altoff
(
(Maryland Midland Railway, Inc.

STATEMENT OF CLAIM:

"Allow Employee Laurence E. Altoff, all lost earnings, including 'Car Pay, 37 hours—40 minutes Compensatory Time, Vacation etc. Health and Welfare Benefits, discipline removed from service record, and restoration to service with seniority unimpaired for having been unjustly dismissed, on approximately 19 August 1987.'"

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The record shows the Claimant was employed on April 6, 1986, in engine and train service and was dismissed on August 19, 1987, on the grounds his job performance was unsatisfactory.

The Claim before the Board is for reinstatement and pay for time lost. While there is considerable argument, on both sides, concerning the merits of the Carrier's decision to terminate Claimant, the Board finds that it must dismiss the Claim on jurisdictional grounds.

It is well settled that the jurisdiction of the Board is restricted by statute to disputes involving "the interpretation or application of labor agreements." The record before the Board, however, reveals there is no Collective Bargaining Agreement in effect on this Carrier and, therefore, there are no Agreement rules to interpret or apply.

The Board has no alternative but to dismiss the Claim. For similar holdings, see Fourth Division Awards 4410, 4478, 4508, 4510 and 4548.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT
BOARD
By Order of First Division

Attest:

/s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 13th day of January 1989.

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Form 1

Award No. 11768
Docket No. 11655
88-2-88-2-214

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

PARTIES TO DISPUTE:

(Transportation Communications Union
(
(Chicago Short Line Railway Company

STATEMENT OF CLAIM:

Claim of the System Committee of the
Brotherhood
(GL-10285) that:

1. Carrier violated the objective conditions of employment when, following an investigation on January 5, 1988, it suspended Car Repairman Helper W. Metzger from service for a period of ten (10) days, commencing on January 21, 1988;

2. Carrier shall now compensate Mr. Metzger for all time lost and shall clear his record of the charge placed against him.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The record indicates that at the time of the occurrence giving rise to the dispute herein there was no collective bargaining Agreement in effect governing rates of pay and working conditions of Claimant.

The burden is upon the Organization to prove that a collective bargaining Agreement was in effect at the time of the occurrence involved, and that such Agreement was violated by the Carrier. It is well settled that the jurisdiction of this Board is confined to disputes which flow from grievance provisions of a collective bargaining Agreement.

There is no proper basis for this Board to consider the dispute and the Claim will be dismissed. (See Fourth Division Award 4683).

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT
BOARD
By Order of Second Division

Attest:

/s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois this 27th day of September 1989.

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Form 1

Award Number 4205
Docket Number 4211

Referee Robert W. McAllister

PARTIES TO DISPUTE:

James C. Johnson
Seattle and North Coast Railroad Company

STATEMENT OF CLAIM:

- (1) That on February 4, 1983 I, James C. Johnson, was unjustly and discriminatorily discharged, and was then suddenly notified that my position of Administrative Assistant had been abolished; and
- (2) that the position of Administrative Assistant be reinstated, and that I be reinstated in that position without discrimination or penalty, at the same pay rate or higher, and with all rights and full benefits repaired to their status as of the termination date including sick leave, vacation, insurance and retirement benefits; and
- (3) that I be reimbursed back pay for the period since February 4, 1983 (less two weeks of severance pay already received) at the same pay rate.

OPINION OF BOARD:

The Claimant, James C. Johnson, was hired by the Carrier on March 8, 1982, as an Administrative Assistant. On February 4, 1983, the Carrier terminated the Claimant for refusing to accept work assignments, not following instructions, unauthorized activity, and insubordination.

From a review of the Claimant's outlined duties as Administrative Assistant, it is apparent the Claimant performed duties for the Carrier's President and Executive Vice-President relating to non-agreement, confidential matters. By his own admission, the Claimant was not a permanent employee nor is there a collective bargaining agreement in effect covering a class of employees such as his position as Administrative Assistant. The Claimant is unable to point to any practice or agreement which would support the inferred assertion his claim involves the interpretation or application of such terms.

This Board, therefore, concludes the Claimant to be a non-agreement employee. Furthermore, as indicated above, the Claimant has advanced no evidence to support the basis for an agreement interpretation.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The Carrier and the employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

10a

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT
BOARD
By Order of Fourth Division

ATTEST:

/s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1985.

APR - 1 1994

In The
Supreme Court of the United States

October Term, 1993

HAWAIIAN AIRLINES, INC., et al.,

Petitioners,

vs.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of The
State Of Hawaii

**BRIEF AMICI CURIAE OF THE STATES OF HAWAII,
ARIZONA, CONNECTICUT, FLORIDA, ILLINOIS,
INDIANA, KANSAS, MAINE, MICHIGAN,
MISSOURI, MONTANA, NEW MEXICO,
PENNSYLVANIA, AND WEST VIRGINIA, AND THE
COMMONWEALTH OF THE NORTHERN MARIANA
ISLANDS IN SUPPORT OF RESPONDENT**

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No. 92-2058

In The
Supreme Court of the United States
 October Term, 1993

HAWAIIAN AIRLINES, INC., *et al.*,
Petitioners,
 vs.

GRANT T. NORRIS,
Respondent.

On Writ Of Certiorari
 To The Supreme Court Of The
 State Of Hawaii

BRIEF AMICI CURIAE OF THE STATES OF HAWAII,
 ARIZONA, CONNECTICUT, FLORIDA, ILLINOIS,
 INDIANA, KANSAS, MAINE, MICHIGAN,
 MISSOURI, MONTANA, NEW MEXICO,
 PENNSYLVANIA, AND WEST VIRGINIA, AND THE
 COMMONWEALTH OF THE NORTHERN MARIANA
 ISLANDS IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The Amici States and Commonwealth are deeply interested in this case, in which Petitioners seek an unprecedented expansion of the preemptive effect of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, insofar as

made applicable to air carriers, *see id.* §§ 181-185, over state statutory and common tort law causes of action intended to protect employees in all lines of work, including those in the air carrier industry, from retaliatory and otherwise malicious discharges, suspensions, and demotions.

The State of Hawaii is one of a number of jurisdictions where protections for "whistleblowers" in the private work force exist either as a matter of statute or the common law of torts. The laws of these States are not limited to workers outside of the air carrier industries.¹

¹ Currently, at least thirty-five States have whistleblower statutes. *See* Alaska Stat. § 39.90.100 (1992); Ariz. Rev. Stat. Ann. § 38-531 (West Supp. 1992); Cal. Gov't Code § 10540; Colo. Rev. Stat. Ann. § 24.50.5-101 (West 1990); Conn. Gen. Stat. Ann. § 31-51q; Del. Code Ann. tit. 29, § 5115 (1991); Fla. Stat. Ann. § 112.3187 (West 1992); Haw. Rev. Stat. § 378-61 (Supp. 1992); 5 ILCS/1 (1993); Ind. Code Ann. § 36-1-8-8 (Burns Supp. 1992); Iowa Code Ann. § 79.28 (West 1991); Kan. Stat. Ann. § 75-2973 (Supp. 1992); Ky. Rev. Stat. Ann. § 61.101 (Michie/Bobbs-Merrill 1986); La. Civ. Code Ann. art. 30:2027 (West 1989); Me. Rev. Stat. Ann. tit. 26, § 831 (West 1988); Md. Code Ann. art. 64A, § 12F (Supp. 1992); Mich. Stat. Ann. § 17.428; Minn. Stat. Ann. § 181.932 (West Supp. 1993); Mo. Ann. Stat. § 105.055 (Vernon Supp. 1992); N.J. Stat. Ann. § 34:19-1 (West 1988); N.Y. Lab. Law § 740 (McKinney 1988); N.C. Gen. Stat. § 126-84 (1991); Ohio Rev. Code Ann. § 4113.51 (Anderson 1991); Okla. Stat. Ann. tit. 74, § 841.7 (West Supp. 1993); Or. Rev. Stat. § 659.505 (1991); 43 Pa. Cons. Stat. Ann. § 1421 (1991); R.I. Gen. Laws § 36-15-1 (1990); S.C. Code Ann. § 8-27010 (Law. Co-op Supp. 1992); Tenn. Code Ann. §§ 49-50-1401 & 50-1-304 (1990); Tex. Rev. Civ. Stat. Ann. art. 6252-16a (West Supp. 1993); Utah Code Ann. § 67-21-1 (Supp. 1992); Wash. Rev. Code Ann. § 42.40.010 (West 1991); W. Va. Code Ann. § 6C-1-1 (1990); Wis. Stat. Ann. § 230.80 (West 1987); Wyo. Stat. Ann. § 35-2-910 (Supp. 1992). Of these States, California, Connecticut, Hawaii, Indiana, Louisiana, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Rhode Island,

Statutory remedies amplify and complement a wide array of common law entitlements, developed with care by the state courts, which as a matter of state tort law bar retaliatory discharges of private whistleblowers as contrary to public policy. *See, e.g., Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *McGrath v. TCF Bank Savings*, 509 N.W.2d 365 (Minn. 1993).

The States' interest in applying these whistleblower remedies to air carriers lies at the heart of the States' police powers, and conflicts with no federal policy. The Nation's airlines owe the highest duty of safety to the public. Each year, aircraft accidents take dozens of lives, and inflict millions of dollars in damage. Avoidance of the costs of air disasters is at the heart of the Amici's concerns in this case.

As this case so poignantly demonstrates, as a general matter the public's first line of defense against air disasters lies with the carrier's own inspection force – the trained men and women who are charged by law with the duty to examine the complex components that comprise an aircraft, to see to it that commercial aircraft that do not meet the highest standards of safety do not make their way out of the hanger, and, if in any respect there is doubt over an aircraft's airworthiness, that those doubts are communicated to relevant regulatory agencies, in most instances the Federal Aviation Administration (FAA).

As this case comes to this Court, there could not be a more compelling set of facts against federal preemption of state statutory remedies. Here, the summary judgment

Tennessee, and Wyoming have statutes that apply to private employees.

record in the lower courts of Hawaii demonstrated that a Hawaiian Airlines mechanic, Respondent Grant Norris, was fired after reporting to the FAA that his employer was knowingly continuing to fly certain McDonnell-Douglas DC-9 aircraft with unsafe landing gear, and was falsifying safety reports – the mainstay of the FAA's air safety system – to cover-up this dangerous practice. The FAA investigation that resulted from Norris's whistleblowing ultimately led to substantial fines against the airline, as well as to administrative findings strongly suggesting that the airline had sought to frustrate the investigation and even to destroy material evidence. See J.A. 26-78. Evidence shows that Norris was punished by the airline for no other reason than his actions in reporting Hawaiian Airlines' dangerous conduct.

Unlike the area of rail safety, where Congress has enacted specific whistleblower protections that, for railroad workers, raise distinct preemption problems (see 45 U.S.C. §§ 441 *et seq.* (Federal Rail Safety Act)), Congress has not provided specific remedies for airline workers who blow the whistle on unsafe practices by their employers, clearly leaving intact at this general level such remedies as the States provide. The question presented in this case is whether Congress, in enacting the Railway Labor Act and applying it to air carriers, intended that a state jury, representing the community served by Hawaiian Airlines, and applying state statutes and rules of decision fashioned by a state legislature and a state's highest court, be prohibited from hearing Grant Norris's case – a case that does not depend on the relevant collective bargaining agreement, but rather solely on whether or not the airline acted with an illegal retaliatory intent in disciplining Norris.

The Amici States submit not only that the answer to this query is clearly "no," but that any other answer would give rise to a radical and unwise expansion of the preemptive force of the federal labor laws. Although it is true that state law wrongful discharge claims are, and doubtless should be, preempted where "the only source of [an employee's] right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement," *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324 (1971), this Court more than thirty years ago made clear that the Railway Labor Act has no preemptive force with respect to state statutory remedies "protecting employees against [illegal] discrimination." *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963). Here, as in *Colorado Anti-Discrimination Commission*, it is the employer's intent that matters. As in anti-discrimination litigation generally, whether the employer here was right or wrong as a matter of its contract interpretation is irrelevant to plaintiff's claim, and to the employer's defense. "Whistleblower" protection doctrine, in Hawaii and elsewhere, does not punish an employer who disciplines an employee for good reasons, bad reasons, or no reasons at all, so long as the reasons that the employer actually acted upon were not the illegal reasons of retaliating for an employee's whistleblowing. See *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). As the States have compelling interests in protecting those airline employees who in their professional judgments bring substantial safety concerns to the attention of regulatory agencies, they have a substantial and weighty interest in this case,

and urge the Court to affirm the judgment of the Supreme Court of Hawaii.

SUMMARY OF ARGUMENT

1. Section 184, Title 45, United States Code, does not require submission of Respondent's state whistleblower claims to mandatory binding arbitration, as those claims do not seek to enforce rights conferred by a collective bargaining agreement. Petitioners' reliance on the term "grievance" in § 184 simply reads that term out of context, and without regard to the background rule of at-will employment which "rates of pay, rules, or working conditions" agreed upon expressly or impliedly by air carriers and their unions abrogate. See 45 U.S.C. § 184 at ¶ 1. In addition to disregarding the literal language of § 184 and its predecessors, *i.e.*, 45 U.S.C. § 153 First (i), Hawaiian Airlines would have this Court ignore decades of its own interpretation of the arbitral scheme established by the RLA. Under this Court's longstanding precedents, the RLA's arbitral mechanism applies only to so-called "minor disputes" under the Act: "major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corp. v. Railway Labor Executives Association*, 491 U.S. 299, 302 (1989); see *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 33 (1957); *Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 687 (1963). By the same token, it is only such contract-enforcing claims that are preempted by the RLA's arbitral mechanism. Cf. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324 (1971). Because Respondent's state law claims do not "seek" "to enforce"

any contractual rights whatsoever, they thus are not preempted.

2. Petitioners' prayer for reversal runs headlong into this Court's unanimous decision in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963). That decision, which squarely upheld the ability of States directly to prosecute claims of invidious racial discrimination in air carrier hiring, is equally applicable to the instant context, where invidious discrimination based upon protected whistleblowing activities is the target of the state claim. It should make no difference, here, that a State has delegated its law enforcement function to a "private attorney general." The rationale of *Colorado Anti-Discrimination Commission* is thus fully applicable to the instant suit, and dictates affirmance.

3. The rationale of this Court's decision in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 567 (1987), in which this Court held that the RLA did not conflict with, and therefore did not impliedly repeal, the remedies of the Federal Employers' Liability Act, similarly mandates that state tort remedies not dependent on a collective bargaining agreement be read as creating no "intolerable conflict" with the arbitral mechanism created for "minor disputes" under the RLA. If the arbitral mandate of the RLA were as all-encompassing as the airline here urges, the Court in *Buell* would have been required to find an "intolerable conflict" between the later-enacted RLA and the FELA. That it did not points the way to resolution of the preemption issue here, on which the airline may prevail only if Congress' intent is clear that state jury resolution of the retaliatory discharge claims in this case " 'conflicts with federal law or would frustrate

the federal scheme.' " *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985). Because such clarity does not exist, preemptive intent should not be assumed.

4. The Court should not expand the preemptive effect of the RLA as Petitioners suggest, for to do so would radically unhinge the doctrinal basis of "federal common law" as it has developed in the field of labor relations, both under the RLA, and the NLRA, both intrusively injecting the federal courts into areas of traditional state concern, thus raising significant issues under the Tenth Amendment, and, as well, triggering serious problems under the First and Seventh Amendments. In its practical impact, preemption of the sort sought by the airline here would operate as a federal mandate for the States to accept intentionally unsafe air carriers within their borders without any recourse through their courts except after-the-fact. *Cf. New York v. United States*, 112 S. Ct. 2408, 2421 (1992). Petitioners' request for elimination of Respondent's jury trial rights, a sharp curtailment of judicial review, and nullification of his right to compensatory and punitive damages, without any *quid pro quo*, independently raises serious and substantial constitutional questions. In the absence of much clearer congressional language than is present in 45 U.S.C. § 184, the Court should confine the statute's preemptive effect to claims arising out of a collective bargaining agreement. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

ARGUMENT

I. The Language of the Railway Labor Act, as Applied by Congress to Air Carriers, and as Consistently Construed by This Court, Applies Solely to Contract-Based Disputes.

Section 184 of Title 45, United States Code, provides that "[t]he disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" must, if not resolved by the "usual" company process for internal disputes, be submitted to an adjustment board chosen by the carrier and its employees.

This language, drawn from 45 U.S.C. § 153 First (i), has for decades been construed by this Court to confine the arbitral mechanism of the RLA to claims that arise out of disputes over collectively bargained rates, rules, or job conditions. As early as *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957), the Court described the disputes subject to arbitration as "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." *Id.* at 33. These disputes, the Court observed six years later, concern "the interpretation and application of existing contracts." *International Association of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682, 687 (1963). Thus, most recently, in *Consolidated Rail Corp. v. Railway Labor Executives Association*, 491 U.S. 299 (1989), this Court reiterated the two-tiered categorical analysis that determines what sort of treatment activity that is in some fashion subject to the RLA is to receive. That analysis divides RLA-governed conflict into "major and minor disputes," recognizing

that "the major/minor terminology, drawn from the vocabulary of rail management and rail labor, as a shorthand method of describing the two classes of controversy Congress had distinguished in the RLA; major disputes seek to create contract rights, minor disputes to enforce them." *Id.* at 302 (citing *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 1723 (1945)). Implicit in *Trainmen, Machinists*, and *Conrail*, is the unquestionable proposition that there are categories of disputes involving employees and covered carriers that are not subject to RLA jurisdiction at all. In a similar vein, in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324 (1972), which held that RLA arbitration, where apt, is mandatory and exclusive, the Court properly ruled that where "the only source of [an employee's] right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement," the RLA preempts state-law causes of action because in such a case interpretation of the agreement is absolutely necessary to deciding the case. *Id.* This is not so here.

II. To Read the Railway Labor Act to Preempt State Whistleblower Claims Would Require Overruling the Court's Unanimous and Considered Conclusion that State Anti-discrimination Remedies are Not Preempted, and Would Wrongly Threaten a Wide Array of Quasi-Criminal State Laws.

Read broadly, the preemptive provisions of 45 U.S.C. § 184 could reach even the criminal law of the States, when that law was drawn in play by "disputes between an employee . . . and a carrier." 45 U.S.C. § 184. It is obvious that a State's interest in enforcing its criminal laws in its own courts, an interest this Court has

described as "one of the most powerful of the considerations" that "must influence our interpretation" of federal preemptive statutes, see *Kelly v. Robinson*, 479 U.S. 36, 49 (1986), cannot be overcome by the language or policies of the RLA. Yet, when all is said and done, that is exactly what the Petitioners ask this Court to repudiate here.

Such a repudiation of the police powers of the States is not, and could not be, the proper result under the law. The relationship between a State's criminal and anti-discrimination laws is a close one. See *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 618 (1986) (holding that abstention under *Younger v. Harris*, 401 U.S. 37 (1971), applies to state court litigation brought under anti-discrimination laws, in part because such laws implicate "important state interests"). In fact, thirty years ago this Court squarely held in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), that nothing in the RLA "bar[s] States from protecting employees against racial discrimination." *Id.* at 724. That admonition is squarely applicable to this case as well, for there is no principled difference for preemption purposes between state laws aimed at deterring invidious racial discrimination, and those targeted at invidious discrimination on the basis of protected conduct. Nor is this case different from *Colorado Anti-Discrimination Commission* because Hawaii has chosen to delegate to a "private attorney general" the authority to invoke the "public-policy" exceptions to the doctrine of employment-at-will. Congress itself, in exercising its enforcement authority under the Commerce Clause and Section 5 of the Fourteenth Amendment, has indeed made clear that retaliatory discharges are amenable to judicial resolution. See 42 U.S.C. § 2000e-3(a). Petitioners have no argument that

federal anti-retaliation protection is nullified by 45 U.S.C. § 184, cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and offer no persuasive argument why analogous protection under state law ought be subject to the draconian treatment they seek.

Instead, Petitioners offer a set of exceedingly weak arguments for divesting the state courts of authority to hear why exactly Mr. Norris was disciplined after reporting his safety concerns to the FAA. Thus, Petitioners rely on the "whistle-blower" statute contained in the Federal Rail Safety Act of 1970, 45 U.S.C. §§ 421 *et seq.*, which has no analogue in the area of air carrier safety. See Pet. Br. at 12. Such reliance rests upon a theory of "implied preemption" that this Court has repeatedly rejected. Absent a "clear and manifest indication that Congress sought to supplant local authority," *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2485 (1991), this Court has allowed the States to enforce neutral regulatory measures, and to adjudicate state-law causes of action that vindicate legitimate health and safety interests. The fact that, as Petitioners concede, the FRSA contains an "explicit preemption provision," Pet. Br. at 14 n.6, calls up "the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). That rule governs this case.

Petitioners, and their amici, also rely heavily on this Court's decision in *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945), as creating an expansive "omitted case" doctrine, akin to an arbitral "black hole," from which no state law claims can escape. As Respondent points out, the

"omitted case" language in *Burley* is *dicta*, and has spawned confusion in the lower courts. That confusion, however, is resolved by the following language of *Conrail*: "the line drawn in *Burley* looks to whether a claim has been made that the terms of an *existing agreement* either establish or refute the presence of a right to take the disputed action." 491 U.S. at 305 (emphasis added).

Here, we have essentially a summary judgment record raising a wealth of evidence that Hawaiian Airlines disciplined Norris for no other reason than his damaging report to the FAA. The Supreme Court of Hawaii, adopting as its own the deferential standards of the lower federal courts on analogous jurisdictional questions, see Pet. App. 6a, construed this evidence favorably to Norris, and to this degree the decision of the court below rests upon an independent and adequate state ground. See *Orr v. Orr*, 440 U.S. 268, 274 (1979). Viewing this record as did the Supreme Court of Hawaii, as this Court must, Respondent's claim does not in any way implicate the collective bargaining agreement's language. Similarly, because Hawaiian Airlines is privileged, so far as Norris's whistleblower claims are concerned, to "us[e] any criteria it may wish to use, except those . . . prohibited under [anti-retaliation doctrine,]" *University of Pennsylvania v. EEOC*, 493 U.S. 182, 198 (1990), Petitioners need not, and, more importantly, a state court need not, resort to the collective bargaining agreement at all to determine whether Respondent's claim stands or falls. It is not necessary for the state juries even to know what is in the collective bargaining agreement, much less to construe it, as it is Petitioners' and their agents' wrongful intent, *vel non*, that matters here. See *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2751 (1993) (the required

finding is "that the employer's action was the product of unlawful discrimination," not that "the employer's explanation of its action was not believable"). Compare *Wheeler v. St. Paul Companies, Inc.*, 1994 WL 11272, 11272*1 (Minn. App. Jan. 18, 1994) ("The burden of proof in a whistleblower claim is the same as for an employment discrimination claim"), with Pet. App. 19a ("[T]he respective positions of the parties to be presented at trial are . . . 'purely factual questions [which] pertain[] to the conduct of the employee and the conduct and motivation of the employer. Neither of [the parties' positions] requires a court to interpret any term of a collective bargaining agreement'").

For these reasons alone, the Court should affirm.

III. The Rationale of this Court's Decision Holding that the Railway Labor Act Does Not Impliedly Repeal Railroad Employees' Rights to Go to Court Under the Federal Employer Liability Act Also Supports Affirmance of the Judgment.

Although the arguments presented above are more than sufficient to support the judgment of the Supreme Court of Hawaii, it is clear that this Court should affirm for the additional reason that to do otherwise would severely undercut the rationale of *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987). In *Buell*, the Court was called upon to decide whether a railroad employee was barred by the RLA from bringing an action for damages under the Federal Employers' Liability Act, simply because conduct related to the injury could have been subject to arbitration under the RLA.

In rejecting the argument that the RLA, enacted after the FELA, impliedly repealed the jury trial rights conferred by the FELA, the Court held that "[i]t is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." *Buell*, 480 U.S. at 565. The Court quoted with approval then-district Judge J. Skelly Wright's conclusion that " 'the Railway Labor Act . . . has no application to a claim for damages to the employee resulting from the negligence of an employer railroad.' " *Id.* In turn, the Court distinguished *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972), as involving a claim where the worker "brought a state wrongful discharge claim based squarely on an alleged breach of the collective bargaining agreement." *Id.* at 566. That state law claim was properly held preempted in *Andrews* only because the RLA dispute resolution mechanism was "mandatory for that type of dispute." *Id.*

In rejecting the railroad's argument, the Court adopted reasoning that is fatal to Petitioners' claim here. The *Buell* Court held there was no "intolerable conflict" between the FELA remedy and the arbitral scheme of the RLA, rejecting the railroad's "parade of horrors" in light of the difficulties of proving the sort of emotional distress claims the railroad feared would upset the RLA's scheme. 480 U.S. at 566-67 & n.13.

This conclusion is relevant to the preemption analysis in this case as well. " 'The purpose of Congress is the ultimate touchstone' " of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504

(1978)). This test is not materially different than the test applied to the railroad's "implied-repeal" argument in *Buell*, and, for this reason, *Buell* is very significant support for the no-preemption ruling below. This is particularly true in that the disuniformity which the Petitioners trot out in their own "parade of horrors" (see Pet. Br. at 19-23) fully exists already in the FELA context, where rail workers have for decades been able to choose between state and federal courts when bringing their claims. *E.g.*, *Dice v. Akron, Canton & Youngstown Railroad*, 342 U.S. 359 (1952). In addition, as in *Buell*, given the difficulties of proving a whistleblowers' case, as well as what one would certainly hope is the infrequency of factual scenarios that generate substantial whistleblower lawsuits, Petitioners' argument that affirmance here would "open the floodgates" proceeds from assumptions that are, at best, totally speculative, if not wholly mistaken.²

Indeed, reversal of the Supreme Court of Hawaii's ruling in this case, rather than preserve the RLA's arbitral mechanism, would summarily displace, through the guise of RLA arbitration, the operation of workers' compensation systems in all of the States and Territories. Because airline workers are not subject to FELA protection, if Petitioners are correct in this case, then it is also true that workers' compensation disputes fall within the

² Moreover, if one is looking to reduce litigation as a whole, one would hardly allow airlines to shunt their employees who validly blow the whistle on airline safety violations into the "narrow labor grievance under the RLA." *Buell*, 480 U.S. at 565. Had the safety violations Norris disclosed been kept secret as certain Hawaiian Airlines' employees at least seemingly intended, an extremely serious accident could have occurred, in which case dozens of lawsuits would certainly have followed.

ambit of 45 U.S.C. § 184, and no State could apply its mechanisms for resolving workers' compensation matters with respect to air carrier employees. Such a result, leading at a minimum to "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy," *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943), and an absurd and unjustified diminution in the rights of air carrier workers vis a vis those of rail workers, is hardly a rational one, and could not be reasonably deemed to have been the intent of Congress when it brought air carriers within the coverage of the RLA in 1936.³

To avoid this result, the Court should affirm the judgment.

IV. Petitioners' Construction of the RLA Should Also Be Rejected Because it Raises Significant Constitutional Questions Under the First, Seventh, and Tenth Amendments.

Even if the foregoing arguments were insufficient to counsel affirmance in their own right, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBar-tolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988). This rule "has for so long been applied by this Court that it is beyond debate." *Id.*; see also *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). This rule applies here three times over.

³ The Court impliedly so held in *Pan American World Airways, Inc. v. Puchert*, 472 U.S. 1001 (1985) (dism'ing appeal from *Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449 (1984)).

As an initial matter, it is important to emphasize that the remedies provided by RLA arbitration have been held to be "narrow," providing no general damages, nor punitive damages. *Buell*, 480 U.S. at 565 & n.12. Similarly, there is nothing in the RLA that eases the evidentiary burdens upon Norris (as in the "compromise" worked by workers' compensation laws; see, e.g., *Second Employers' Liability Cases*, 223 U.S. 1 (1912)). Therefore, there is no "quid pro quo" here to cushion the harm inflicted by federal preemption on individuals like Norris, and the State of Hawaii, whose laws vindicate its people's interests. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

Whether the United States Congress could constitutionally foreclose the rights of Hawaii citizens such as Grant Norris through mandatory arbitration of the nature sought in this case is at best unclear. This Court has held, for example, that "filing a complaint in court is a form of petitioning activity," *McDonald v. Smith*, 472 U.S. 479, 484 (1985), and, at a minimum, federal preemption, to be constitutional, would require showings sufficient to meet applicable limits on "time, place, and manner" regulation. Compare *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989) (identifying permissible scope of such regulation), with *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 334-35 (1985) (upholding limits only on the amounts to be paid to counsel). Independent of First Amendment interests, any abolition of Norris's state-created jury right raises a legitimate question under the Seventh Amendment. The Court has made clear that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies,

enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 193 (1974). It is clear that Norris would be entitled to a jury trial in the federal courts if, for example, he were employed by an out-of-state air carrier, and sued either under the state whistleblower statute or the common law exception to at-will employment, and it is doubtful that Congress could abolish that jury right in the Courts of the United States, particularly as the arbitral forum here provides nothing in the way of a *quid pro quo* for elimination of the advantages of the state law suit. These doubts are equally applicable to this case, where Norris sought (and fought for) a state forum against the air carrier. See also *Johnson v. Robinson*, 415 U.S. 361 (1974) (on the presumption against the elimination of plenary judicial review).

The States, moreover, have independent constitutional interests in police power measures intended to protect the health, welfare, and safety of their citizens. Here, it should be noted, Hawaiian Airlines' McDonnell-Douglas DC-9 aircraft were slated solely for inter-island travel. An accident which involved one of the subject aircraft would doubtless have affected many Hawaii citizens, both on the ground, and in the air, and would have had extensive secondary effects on local property, and on the local economy as a whole, which is heavily dependent upon tourism. It is also clear that the State of Hawaii has very little – if any – ability to keep Hawaiian Airlines from actually flying within the State of Hawaii. See *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). Under these circumstances, all Hawaii can do is protect those who act as the eyes and ears of the public – Hawaiian Airlines' trained inspection personnel – from retaliation for reporting airline safety problems to relevant federal authorities. To strip the State of this last vestige of

its ability to protect itself and its residents would raise a very serious Tenth Amendment issue under this Court's decision in *New York v. United States*, 112 S. Ct. 2408 (1992). In that case, the Court held that the "take title" provisions of Low-Level Radioactive Waste Policy Amendments of 1985 to be an unconstitutional "congressionally compelled subsidy from state governments to nuclear waste producers." *Id.* at 2428. Reversal of the judgment portends a similar sort of subsidy from the States to the air carrier industry. The Court should thus affirm.

CONCLUSION

For the reasons above, the judgment should be affirmed.

Dated: Honolulu, Hawaii, April 1, 1994.

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In The
Supreme Court of the
United States

October Term, 1993

HAWAIIAN AIRLINES, INC.,

-against-

GRANT T. NORRIS,

Petitioner,

Respondent.

AND

PAUL J. FINAZZO, HOWARD E. OGDEN
and HATSUO HONMA,

-against-

GRANT T. NORRIS,

Petitioners,

Respondent.

*On Writ of Certiorari to the Supreme
Court for the State of Hawaii*

BRIEF OF THE ALLIED EDUCATIONAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Allied Educational Foundation ("AEF") is a non-profit public interest group devoted to supporting the development of public policies that contribute to a free society in which the rights of individuals guaranteed by the United States Constitution are fully protected. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. Supporters of AEF include representatives of business, labor and the general public.

It is the belief of AEF that the ability of labor and management to resolve disputes in an atmosphere of equality is vital to the strength of the economy of the United States. Unnecessary government interference upsets this balance and creates a risk of economic strife that weakens the American economy. The judicial process is a critical area for maintaining a free society, and the public interest is best served by a legal structure that permits, to the fullest extent possible, the resolution of disputes between employers and employees by collective bargaining, with a minimum of governmental interference, in the free pursuit of the negotiating process by both sides. AEF is concerned that a determination adverse to the position of the respondent in this matter will effectively sanction inappropriate governmental interference in the collective bargaining process.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief by AEF on behalf of respondent.

STATEMENT OF THE CASE

Respondent was terminated from his employment because he was a "whistleblower." The basic issue presented on this appeal is whether the pre-emption doctrine precludes an employee, such as respondent, covered by a collective bargaining from availing himself of a cause of action arising from his termination, where he would otherwise have been entitled to assert such a cause of action under state law if his employment were not covered by a collective bargaining agreement.

In the decision below, the Supreme Court of Hawaii denied a motion by the employer to dismiss the state action of the employee. In so proceeding, the Court stated:

Our review is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Norris v. Hawaiian Airlines, Inc., 842 P.2d 634, 637 (Haw. 1992) (quoting *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir. 1989)). Accordingly, it is respectfully submitted that, for jurisdictional purposes, this Court should accept as true the factual allegations set forth in respondent's complaint.

In summary, respondent alleges that he was wrongfully discharged by his employer, petitioner Hawaiian Airlines, Inc. ("HAL"),¹ from his job as an aircraft mechanic. At HAL, respondent was responsible for making aircraft repairs and, thereafter, returning the aircrafts to service. As a mechanic licensed by the Federal Aviation Administration ("FAA"), respondent was not permitted to approve for service any aircraft or part that did not meet safety guidelines.

On July 15, 1987, respondent was inspecting the landing gear on one of HAL's DC-9 aircrafts, when he discovered that a critical part of the landing gear was damaged. Respondent investigated further and found that the axle sleeve, which normally has a smooth surface, was so badly scarred, gouged and burned that, in its present condition, the plane's entire landing apparatus was in jeopardy of failing. Although respondent and the other mechanics present believed that the axle sleeve needed to be changed at once, respondent's supervisor directed the mechanics to hand-sand the part and to return the aircraft to service. After the plane was returned to service, respondent was directed by his supervisor to certify the maintenance record, indicating that the repair had been performed satisfactorily and that the plane was airworthy. Respondent refused and was immediately suspended. Later that day, respondent notified the FAA of the danger that he perceived as a result of the maintenance

¹ Petitioners in this appeal include HAL and certain of HAL's officers and managers.

procedures that had been performed on the HAL DC-9. Thereafter, respondent returned to the HAL office at which he worked and reported to an Assistant Director what had happened, including his having contacted the FAA. In response, the Assistant Director summarily terminated respondent on the spot.

As a result of respondent's communications, the FAA inspected the HAL DC-9 in question and seized the axle sleeve about which respondent had reported. Several months later, the FAA notified HAL that it was to be the subject of a broader FAA investigation. Prior to the official commencement of the investigation, however, an FAA investigator caught HAL employees removing axle sleeves from several aircrafts. The FAA ordered that the removed sleeves be turned over to it. HAL advised the FAA, however, that almost all of the sleeves had been "lost" or "misplaced." Ultimately, following the FAA's issuing a report of findings and conclusions regarding the facts surrounding the disappearance of the axle sleeves,² HAL agreed to pay a fine of \$360,000, resolving all charges that had been brought involving this incident.

After his termination, respondent invoked the grievance procedures outlined in the collective bargaining agreement between HAL and respondent's union, the International Association of Machinists,

² Among other things, the FAA found that HAL had made 958 flights with the axle sleeve that had been reported as damaged by respondent.

entered into pursuant to the provisions of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188. That agreement provides that an employee may be disciplined only for just cause. Citing a provision of the agreement that an aircraft mechanic "may be required to sign work records in connection with the work he performs," HAL argued that respondent had been terminated for insubordination.

Prior to the grievance hearing, HAL offered to reduce respondent's punishment from termination to suspension, with the understanding that "any further instance of failure to perform duties in a responsible manner" could result in discharge. Respondent disregarded the offer and, instead, instituted this action in Hawaii state court. The gravamen of respondent's complaint is that the retaliatory acts of HAL's employees resulting in his termination violated public policy as articulated in the Hawaii Whistleblowers' Protection Act ("HWPA"), Haw. Rev. Stat. §§ 378-61 through -69 (1988 & Supp. 1992), as well as in the Federal Aviation Act and the Federal Aviation Regulations. The lower state courts dismissed respondent's state retaliatory discharge claims for lack of subject matter jurisdiction, on the ground that state jurisdiction was pre-empted by the RLA. The Supreme Court of Hawaii reversed, holding that the RLA did not pre-empt respondent's claims. See *Norris v. Hawaiian Airlines, Inc.*, 842 P.2d 634 (Haw. 1992).

SUMMARY OF ARGUMENT

The resolution of respondent's retaliatory discharge claims depends upon factors that would not require an interpretation of the collective bargaining agreement. Accordingly, these claims are not pre-empted by the RLA.

The State of Hawaii has statutorily enunciated the public policy that employees should be afforded protection from retaliation based upon their having reporting wrongdoing or unsafe working conditions. Such public policy is also found in the Federal Aviation Act and the regulations promulgated thereunder. Encouragement of so-called whistleblowers is fundamental to government's capacity to safeguard the public from wrongdoing. The instant case is poignantly illustrative of this concept. The alternative to state statutory protection of the workers--that is, countenancing the public's being exposed to the risks of traveling in unsafe commercial aircrafts--need not be embraced, inasmuch as respondent's claims do not arise under a collective bargaining agreement, and the state litigation of these claims does not offend the principles underlying the RLA.

Indeed, the dismissal of respondent's claims on the ground that they are pre-empted by federal legislation relating to the resolution of disputes under collective bargaining agreements would improperly deprive respondent, and others like him, of the same access to state worker protection laws as is afforded to

nonunion members, who are not covered by a collective bargaining agreements. It was never intended that state laws designed to protect all workers should be foreclosed to some workers simply because they are unionized.

ARGUMENT

I. Respondent's Retaliatory Discharge Claims Are Not Pre-empted By The RLA

A. Pre-emption Is Unjustified Under a "Major" Dispute/"Minor" Dispute Analysis

Much is made in petitioners' brief concerning the purported distinction between the standard, most recently reiterated by this Court in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989), for classifying labor disputes under the RLA as "major" or "minor," and the standard articulated by the Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), for the pre-emption of state law by federal law. *Amicus* respectfully submits that, to the extent that there exists any such distinction, it is irrelevant to the facts in this case. Although *Lingle* involved an application of Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and not the RLA, the policy reasons furnished by this Court in connection the pre-emption doctrine are equally germane:

[I]f the resolution of a state-law claim depends upon the meaning of a collective

bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor law principles--necessarily uniform throughout the nation--must be employed to resolve the dispute.

Id. at 405-06 (footnote omitted). Where, as here, there exist independent state worker protection laws, under which claims may be asserted that will create no risk of results that are inconsistent with any federal labor law principles, there is no reason to keep the state claim from proceeding, to the same extent as if plaintiff were not a unionized employee.

Disputes between labor and management arising under the RLA have been classified as either "major" or "minor" for the purposes of determining whether arbitration should be mandated. This Court adopted the "major/minor" terminology "as a shorthand method of describing two classes of controversy Congress had distinguished in the RLA: major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corp.*, *supra*, 491 U.S. at 302 (citing *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711 (1945)). In the event of a "major" dispute, the statutory bases of which are Sections 2 (seventh) and 6 of the RLA, 45 U.S.C. §§ 152 (seventh) and 156, the parties are required to undergo a lengthy process of bargaining and

mediation. "Once this protracted process ends and no agreement has been reached, the parties may resort to the use of economic force." *Id.* at 303.

Consolidated Rail Corp. did not, itself, involve an application of the pre-emption doctrine; instead, that case arose from a challenge by a collection of labor organizations to an employer's addition of drug testing procedures to routine physical examinations. *See id.* at 300. In determining that the matter should be arbitrated because resolution of the dispute necessarily involved an interpretation of the collective bargaining agreement, the Court held "that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior regulation, and if that claim is arguably justified by the terms of the parties' agreement (i.e., the claim is neither obviously insubstantial or frivolous, nor made in bad faith), the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board." *Id.* at 310.

At bar, logic dictates that no "interpretation" (indeed, no reference) to the collective bargaining agreement is necessary in order to resolve respondent's claim that he was terminated in retaliation for his having gone to the FAA with information of what he perceived to be a dangerous situation, violative of FAA guidelines, that could result in a loss of human lives. The only provision of the collective bargaining agreement that petitioners argue is applicable is Article XVII.F, which provides that "[a]n employee's refusal to perform work

which is in violation of established health and safety rules, or any local, state or federal safety law shall not warrant disciplinary action." (Appendix to the Petitioner for a Writ of Certiorari, at 60a-61a) However, this provision does not relate at all to the factual basis of respondent's retaliatory discharge claims, which is that respondent was disciplined not for a work refusal, but for reporting to the FAA wrongdoing and a dangerous condition at HAL that involved a serious hazard to the public.

Where, as here, an action taken by an employer is not even "arguably justified" by the collective bargaining agreement, the dispute cannot be deemed "minor," and, therefore, the forum for resolving a grievance arising out of that action is not limited to the arbitral mechanism of the RLA. *Id.* at 307. As the Court below found:

[Respondent's] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the agreement, nor do they point to any part of the CBA which demonstrates that the carrier and union have agreed on standards relative to [respondent's] situation.

Norris v. Hawaiian Airlines, Inc., 842 P.2d 634, 644 (Haw. 1992). Thus, under the standard articulated in

Consolidated Rail Corp., inasmuch as the claim need not (and, indeed, cannot) be resolved by reference to the collective bargaining agreement, the RLA is not implicated, and, therefore, the RLA does not pre-empt the retaliatory discharge claims asserted by respondent.

B. Respondent's Claims Also Survive Scrutiny Under The More Traditional Standard for Pre-emption

The "major/minor" test was established by this Court in *Burley* and *Consolidated Rail Corp.* in the context of claims brought against employers in the United States District Court for violation of the RLA. Federal courts have jurisdiction to decide "major" disputes. *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 673 F.2d 700, 706 (3d Cir. 1982). "Minor" disputes, on the other hand, "concern the interpretation or application of collective bargaining agreements, and are resolved through binding arbitration before the System Board of Adjustment." *International Ass'n of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985). Federal courts do not have subject matter jurisdiction to resolve "minor" disputes. *Id.*; see also *International Ass'n of Machinists and Aerospace Workers v. Alaska Airlines, Inc.*, 813 F.2d 1038 (9th Cir. 1987), cert. denied, 108 S. Ct. 290 (1988); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F.2d 139 (2d Cir. 1986).

Amicus respectfully submits that the "major"/"minor" test is not appropriate to determining

whether an action, such as this one, brought in state court under state statutory or common-law worker protection principles should be pre-empted by the RLA. Instead, the traditional standard articulated by this Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), which was employed (at least in part) by the Court below, should be applied. Although *Lingle* arose in the context of Section 301 of the LMRA, 29 U.S.C. § 185, its underlying principles are applicable in any case in which federal labor laws are invoked in an effort to pre-empt state law.

For example, this Court held in *Lingle* that, if resolution of the claim requires interpretation of the terms of a collective-bargaining agreement, the state law should properly be deemed pre-empted by federal labor law. *See id.* at 407 n.7. Applying this standard to the facts in *Lingle*, the Court analyzed the elements of plaintiff's state tort claim of retaliatory discharge for filing a workers' compensation claim: "(1) he was discharged or threatened with discharge and (2) the employers' motive . . . was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights." *Id.* at 407 (citation omitted). In defending against such a claim, the employer "must show that it had a nonretaliatory reason for the discharge." *Id.* Based upon this analysis, the Court held, "the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.*

In the case at bar, it is impossible to resolve respondent's retaliatory discharge claims by construing the collective bargaining agreement, inasmuch as his claims are wholly independent of that agreement. Here, as in *Lingle*, respondent's claims pertain "to the conduct of the employee and the conduct and motivation of the employer. [None] of the elements [of the claims] requires a court to interpret any term of a collective-bargaining agreement." *Id.* As was the case in *Lingle*, "this purely factual inquiry . . . does not turn on the meaning of any provision of a collective-bargaining agreement." *Id.* Accordingly, inasmuch as no interpretation of the collective bargaining agreement is required to evaluate respondent's claims, those claims are not pre-empted by the RLA.³

³ Parenthetically, petitioners' additional argument that Congress has expressly committed "whistleblower" claims to RLA jurisdiction (*see* Opening Brief of Petitioner, at 12-14) is simply not the case. Indeed, petitioners point to no provision of the RLA that proscribes retaliatory discipline by employers. Instead, petitioners cited a "whistle blower" provision in the Federal Rail Safety Act of 1970, 45 U.S.C. § 421 *et seq.* as somehow providing a basis for the contention that the RLA contains such a provision. To the contrary, the RLA contains no such provision. (If anything, the fact that Congress chose not to include such a provision in, or to add such a provision to, the RLA is an indication of Congressional preference that state retaliatory discharge claims not be deemed pre-empted by the RLA.)

II. Dismissal of Respondent's State Law Claims Would Improperly Deprive Respondent of The Benefit of Worker Protection Legislation

A. Depriving Respondent of Protection Under the HWPB On The Basis of His Union Membership Interference With The Collective Bargaining Process

So-called "whistleblower" statutes have become a central element of a broad spectrum of state legislation aimed at shielding employees from retributive conduct on the part of their employers. *See generally* Westman, *Whistleblowing: The Law of Retaliatory Discharge*, at 177-87 (BNA 1991). Most states have now adopted whistleblower statutes protecting governmental employees, and some fifteen states have adopted statutes that protect private sector employees.⁴

It seems self-evident that the broad, far-reaching public policy concerns addressed by the Hawaii state legislature in the HWPB would be frustrated if one class

⁴ See Statement of Daniel Westman, *Hearing on H.R. 1664, Corporate Whistleblower Protection: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 102d Cong., 2d Sess. (1992). The states that have enacted whistleblower legislation covering private sector employees include California, Connecticut, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Tennessee and Wisconsin. *See* Barnett, *Overview of State Whistleblower Protection Statutes*, 43 Lab. L.J. 440 (1992).

of employees within the state--that is, employees covered by collective bargaining agreements--were deprived of the protections set forth in this legislation. Such deprivation would be unfair to those employees who chose to join a union and would deprive the public of the benefit of information known to that large portion of the labor force that is unionized.

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, provides employees with a federally protected right to uninhibited, unconditional participation in the collective bargaining process. The exclusion of unionized workers from state worker protection laws could, therefore, easily disrupt the "balance of power designed by Congress" that this Court has referred to in the context of employer-employee relations. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986).

Indeed, a real danger exists that such a disruption of the employer-employee relationship could create a chilling effect on the collective bargaining process generally. For example, employees considering whether to join a union would first have to weigh the value of lost state labor benefits against the benefit of union membership. This factor places an unfair burden on the union in collective bargaining, inasmuch as employers do not lose any of their comparable state law rights when they enter collective bargaining. Indeed, the prospect of loss of state labor law protection that would result from the dismissal of the respondent's claims could be a powerful weapon in the hands of an anti-union

employer.⁵

As this Court stated in *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967):

National labor policy has been built on the premise that by pooling their economic strength and acting through a

⁵ Such a scenario would be tragically inconsistent with a fundamental tenet of American labor law that the government should foster employee organization and promote equity in bargaining between employers and employees. For example, the findings and policies set forth in the NLRA provide, in pertinent part:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151; see also *NLRB v. Jones & Laughline Steel Corp.*, 301 U.S. 1, 45 (1937) ("[t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel").

labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.

Id. at 180. The Court has also recognized that "both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (citations omitted). Just as an employer comes into negotiations with the authority under state common law to exercise fundamental managerial prerogatives, workers come to collective bargaining with certain legal rights that underpin their bargaining position, such as the protections afforded to all employees by state labor laws. See *id.* Consistent with this balance of power, this Court has consistently ruled that unionized workers should not be penalized for their collective bargaining activity by the loss of minimum state labor standards. See, e.g., *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Yet, depriving respondent of protection under the HWPB on the sole basis that he is covered by a collective bargaining agreement would create just such a penalty.

B. Public Policy is Best Served by Allowing Claims Asserted Under State Worker Protection Laws to be Litigated

Whistleblower protection laws are specifically designed to protect workers from employer abuses. For example, the HWPB provides, in pertinent part, that an employer:

shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because . . . [t]he employee . . . reports or is about to report to a public body . . . a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false.

Haw. Rev. Stat. § 378-63(a) (1988). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. *See id.* § 378-63(a) (1988). This legislation is typical in that it is intended to curtail one of the "most catastrophic events that can happen in life[,] the sudden and unexpected loss of gainful employment," Raab, *Time for an Unjust Dismissal Statute in New York*, 54 Brook. L. Rev. 1137, 1161 (1989), where that termination is predicated on an employer's retaliation for an employee's justified act of disclosing to an

appropriate authority the employer's wrongdoing which adversely affects the general public.

Critical to the importance of allowing the whistleblower protection laws to provide remedies for claims such as respondent's is that the whistleblower laws encourage employees to report the presumably illegal acts of their employers without fear of retribution. Clearly such a goal cannot be deemed offensive to the RLA. It would be Kafkaesque irony to allow petitioners to invoke the worker protection safeguards Congress promulgated in the RLA in order to defeat different, unrelated worker protection safeguards promulgated by the State of Hawaii. As one commentator observed, business and industry groups often seek to have state laws pre-empted when "they have found state regulatory schemes more burdensome, or their enforcement more aggressive, than pertinent federal legislation." Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U.L. Rev. 685, 691-92 (1991) (footnote omitted). Professor Hoke warns:

The shortcomings resulting from current preemption practice have a broader impact than that of fortifying the substantive injuries to the public that flow from misguided or weak national regulation [I]t kills off one line, perhaps even an entire scheme, of a particular community's law. Further, the law slayed by a preemption ruling arises from the political and legal bodies that are

both closest and most amenable to practical political efforts by average citizens. A federal preemption ruling authoritatively revokes state and local governmental power over the subject matter and effectively affirms that power may be exercised solely by the national governmental bodies.

Id. at 694 (footnotes omitted).

Were this Court to hold that the RLA pre-empts the Hawaii whistleblower statute, then the grave public policy concerns addressed by the Hawaiian legislature in this legislation would, in this instance, be eviscerated.

CONCLUSION

For the foregoing reasons, the Order of the Court below should be affirmed. An employee's right to protection from retaliatory discharge, which the State of Hawaii, under its police powers, deemed worthy of specific legislation should not be denied as a result of a collective bargaining agreement flowing from respondent's membership in a union. It is not equal enforcement that is offensive to federal law, it is the denial of equal enforcement that is prohibited by federal law.

Respectfully submitted,

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